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No.

Supreme Court, U. S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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**RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
APPELLANTS**

*v.*

**BARLOW'S, INC.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

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**JURISDICTIONAL STATEMENT**

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**OPINION BELOW**

The opinion of the three-judge district court (App. A, *infra*) is not yet officially reported. It is unofficially reported at 4 BNA OSHC 1887 and 3 CCH ESHG Para. 21,418.

**JURISDICTION**

The judgment of the district court declaring Section 8(a) of the Occupational Safety and Health Act

of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), unconstitutional and enjoining the Secretary from acting pursuant to that Section was entered on December 30, 1976 (App. B, *infra*). A notice of appeal to this Court (App. C, *infra*) was filed on January 4, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.<sup>1</sup>

### QUESTIONS PRESENTED

1. Whether the inspection provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), and their implementing regulations, violate the Fourth Amendment insofar as they authorize representatives of the Secretary of Labor to inspect without a warrant at reasonable times commercial premises routinely occupied by an employer's work force.

2. Whether, in any event, the district court should have upheld the constitutionality of the statute by interpreting it to meet Fourth Amendment requirements, instead of holding the statute unconstitutional and enjoining its enforcement.

### STATUTE INVOLVED

Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), provides:

<sup>1</sup> Because the action was commenced on January 6, 1976, the three-judge court had jurisdiction to consider appellee's constitutional claims (see Section 7 of Pub. L. 94-381, 90 Stat. 1119, 1120).

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

### STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSHA), 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651.<sup>2</sup> As we explained in our

<sup>2</sup> The need for the Act is explained in S. Rep. No. 91-1282, 91st Cong., 2d Sess. 2-4 (1970); Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 1st Sess. ("Leg. Hist.") 142-144 (1971):

The problem of assuring safe and healthful workplaces \* \* \* ranks in importance with any that engages the national attention today. \* \* \* 14,500 persons are killed annually as a result of industrial accidents; \* \* \* during

brief in *Irey v. Occupational Safety and Health Review Commission*, No. 75-748, argued November 29, 1976, the Act creates a federal statutory duty to avoid maintaining unsafe or unhealthy working conditions applicable to any non-governmental employer whose business affects commerce. 29 U.S.C. 654(a)(1) and (2); 652 (5).

The Act is administered by the Department of Labor, whose inspectors are authorized to conduct safety and health inspections at places of employment. 29 U.S.C. 657(a). If upon inspection or other investigation the Secretary has cause to believe

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the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes \* \* \* [and] the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. \* \* \* In sum, the chemical and physical hazards which characterize modern industry are not the problem of \* \* \* a single industry, nor a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.

The House Report (H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. 14 (1970), Leg. Hist. 844) defines occupational health and safety as "the most crucial [issue] in the whole environmental question", and notes that "[t]he on-the-job health and safety crisis is the worst problem confronting [over 80 million] American workers."

that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, fixing a reasonable time for its abatement, and (in his discretion) proposing a civil penalty. 29 U.S.C. 658, 659.<sup>3</sup>

The inspections must be made at reasonable times and in a reasonable manner, and must be limited to the scope necessary to identify occupational hazards (29 U.S.C. 657(a)). Upon presenting his credentials

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<sup>3</sup> The amount of the proposed penalty "if any" (29 U.S.C. 659(a)) depends on the severity of the hazard and the cited employer's past diligence in attempting to discover and correct it (*ibid.*, see 29 U.S.C. 666(i) and (j)). The prospect of such penalties is designed to promote voluntary compliance by employers before any inspector arrives. 29 U.S.C. 651(1); see Leg. Hist. 463-464, 470 (Sen. Javits), 471-472 (Sen. Dominick), 853; *Brennan v. Occupational Safety and Health Review Commission*, 487 F. 2d 438, 441, 443 (C.A. 8). Cf. *National Independent Coal Operators' Association v. Kleppe*, 423 U.S. 388, 401. Such proposed penalties may range up to \$1,000 for serious violations, and to a maximum of \$10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666(a)-(c) and (j). The Secretary may also propose a civil penalty of not more than \$1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final agency order, 29 U.S.C. 659(b), 666(d), and may seek temporary injunctions in federal district court to correct imminent dangers before administrative enforcement would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter to the Department of Justice for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a \$10,000 fine. 29 U.S.C. 666(e). However, of approximately 400,000 inspections conducted since the Act's April 1971 effective date, only 5 have resulted in criminal prosecution.

to the employer or agent in charge,<sup>4</sup> the inspector is entitled to immediate entry to any premises where work is performed by employees of the employer (29 U.S.C. 657(a)); advance notice of the inspection is prohibited (29 U.S.C. 666(f); 651(10)). The employer is entitled to accompany the inspector during his tour of the relevant premises, and may raise privacy or other objections to the conduct of the inspection. 29 U.S.C. 657(e); see 29 C.F.R. 1903.4, 1903.7(e), 1903.8.<sup>5</sup>

The statute provides no sanctions for refusals to permit inspections. In implementing the statute, the Secretary has promulgated a regulation requiring the inspector to seek a court order authorizing entry if the employer refuses to consent to the inspection (29 C.F.R. 1903.4).

2. Appellee Barlow operates an electrical, plumbing, and heating-air conditioning installation business in Pocatello, Idaho. At 11 a.m. on September 11, 1975, an OSHA inspector arrived at Barlow's to

<sup>4</sup> These credentials paraphrase and cite the statutory authority to inspect. See *Usery v. Godfrey Brake and Supply Service*, C.A. 8, No. 76-1247, slip op. 2, 5 (November 19, 1966). Inspectors may offer toll-free verifying calls to their area offices if these credentials do not convince employers of the propriety of the inspection. *Ibid.* Agency regulations also require that the inspector explain the nature, purpose and scope of the proposed inspection. 29 C.F.R. 1903.7(a).

<sup>5</sup> Trade secrets and other compelling privacy interests of the employer are explicitly protected. 29 U.S.C. 664-665; 29 C.F.R. 1903.9.

make a routine inspection of its work areas,<sup>6</sup> presented his credentials, explained his mission to the company's president, and was denied entry because he did not have a search warrant. After notice and hearing on December 30, 1975, the Secretary obtained a district court order authorizing the entry for inspection purposes (App. A, *infra*, pp. 1a-2a).

On January 5, 1976, the inspector returned to Barlow's and requested permission to inspect based on this order. Permission was again denied, and the next day the appellee filed a complaint alleging that 29 U.S.C. 657(a) is inconsistent with the Fourth Amendment, and seeking temporary and permanent injunctions against OSHA inspections. On January 15, 1976, a single judge denied Barlow's requests for preliminary relief (App. A, *infra*, p. 3a).

A three-judge court was convened, and on December 30, 1976, it concluded that 29 U.S.C. 657(a) is "unconstitutional and void", relying on *Camara v. Municipal Court*, 387 U.S. 523, and *See v. City of Seattle*, 387 U.S. 541. The court permanently enjoined the Secretary from conducting safety inspections pursuant to 29 U.S.C. 657(a) to enforce OSHA, and specifically from inspecting appellee's premises.<sup>7</sup>

<sup>6</sup> The inspection was a "general schedule" investigation—it was not based on any employee complaint, history of employer noncompliance, or other reason to believe a violation was occurring at that particular place of business (App. A, *infra*, p. 2a).

<sup>7</sup> On February 3, 1977, Mr. Justice Rehnquist stayed the district court's order "except at it applies to appellee Barlow's, Inc.," until final disposition of this case.

### THE QUESTIONS ARE SUBSTANTIAL

1. The decision below, if permitted to stand, would seriously impair effective implementation of federal legislation designed to protect the health and safety of the Nation's workforce. The decision is not required by this Court's decisions applying the Fourth Amendment to administrative inspections; indeed, it is inconsistent with the rationale of *Colonnade Catering Corp. v. United States*, 397 U.S. 72, and *United States v. Biswell*, 406 U.S. 311, which dealt with closely similar Fourth Amendment issues.

Without the ability to make the unannounced visits the Act contemplates,\* the Secretary cannot effectively implement OSHA by identifying and requiring the correction of hazards threatening employees.\* In

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\* Congress intended the Secretary to enter and inspect work places without a warrant. See S. Rep. No. 91-1282, *supra*, at 11 (Leg. Hist. 151):

In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employment establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment \* \* \* to inspect and investigate within reasonable limits all pertinent conditions \* \* \*.

H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 22 (1970) (Leg. Hist. 852), is to the same effect.

\* In addition to routine random inspections, inspections are undertaken to confirm worker complaints of imminent dangers or other hazards, 29 U.S.C. 657(f), 662; investigate job-

addition, the constant possibility of such inspections and the knowledge that violations discovered by the inspectors may lead to monetary sanctions are essential to secure the broad voluntary compliance on which the program depends.<sup>10</sup> Congress recognized that workplace hazards are so pervasive and in the main so transient or easily concealed that unannounced spot checks were needed, since "advance notice to an employer has been a prime cause of the breakdown in \* \* \* enforcement" under other safety statutes (H. R. Rep. No. 91-1291, 91st Cong., 2d Sess. 26127 (1970); Leg. Hist. 856-857). It accordingly specified that the inspection is to be without advance notice (29 U.S.C. 651(10)) and the inspector is authorized to enter the premises to be inspected "without delay" (29 U.S.C. 657(a)).<sup>11</sup>

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related fatalities or catastrophes, cf. 29 C.F.R. 1904.8; reinspect workplaces to determine compliance with abatement orders, 29 U.S.C. 659(b), 660(b); and investigate claims that employers have retaliated against workers for exercising their rights under the statute. 29 U.S.C. 660(c).

<sup>10</sup> See, e.g., 29 U.S.C. 659(a) and (b); *Usery v. Godfrey Brake and Supply Service*, C.A. 8, No. 76-1247, slip op. 6-7 (decided November 19, 1976); *Dunlop v. Rockwell International*, 540 F. 2d 1283, 1292 (C.A. 6); *Brennan v. Occupational Safety and Health Review Commission*, 487 F. 2d 438, 441, 443 (C.A. 8). Cf. *National Independent Coal Operators' Association v. Kleppe*, 423 U.S. 388, 401; *Godwin v. Occupational Safety and Health Review Commission*, 540 F. 2d 1013, 1016 (C.A. 9).

<sup>11</sup> Congress was also sensitive to the interests of the employers; it provided significant safeguards to assure that the interference with their operations is no greater than the interests protected by the Act require. Thus, the scope of the

A warrant requirement would significantly impede the effectuation of the statute's purpose, whether the warrant need be sought only after access is refused or prior to any attempt to inspect. As this Court noted in *See, supra*, 387 U.S. at 545, n. 6, "surprise may often be a crucial aspect of routine inspections of business establishments." Here, in view of the ease with which hazardous working conditions may frequently be temporarily concealed or ameliorated,<sup>12</sup> the effectiveness of the inspection system

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inspection permitted is limited to that necessary to identify occupational hazards, it is to be made during working hours or at other reasonable times (29 U.S.C. 657(a)), and the employer is entitled to notice of the inspector's authority (29 U.S.C. 657(a)) and to protection of his compelling privacy interests (29 U.S.C. 664-665).

<sup>12</sup> For example, employers who have permitted spray-booth ventilating fans designed to remove toxic and flammable substances to become clogged with residues may swiftly restore them to operating condition before allowing them to deteriorate again after inspection. Cf. 29 C.F.R. 1910.107. Employers who have allowed employees to work in unshored trenches, 29 C.F.R. 1926.652(a) and (b), or without protective hard hats, safety belts, respirators, ear plugs, or guard rails, 29 C.F.R. 1910.23, 1910.95(b)(1), 1910.132-136; 29 C.F.R. 1926.28(a), 1926.104-105, 1926.500, may quickly require use of such equipment, then rescind or ignore such orders to reduce expenses or increase production. Cf., e.g., *I.T.O. Corp. of New England v. Occupational Safety and Health Review Commission*, 540 F. 2d 543 (C.A. 1); *C.N. Flagg & Co.*, OSHRC No. 1734, 11 OSHARC Reports 632, affirmed without opinion, C.A. 2, No. 74-2362 (January 12, 1976). Guards to prevent amputations from work with hazardous machines, e.g., 29 C.F.R. 1910.212, .217, may be turned off or by-passed by foremen or individual operators when they are sure an inspector will not be present—a common produc-

would be largely nullified if an employer could gain significant delay by refusing to permit an inspection without a warrant.<sup>13</sup> This would be particularly true where—as is commonly the case in civil warrant practice—a show cause order issues before compulsory process may be obtained.

The alternative of routinely obtaining *ex parte* warrants before attempting an inspection would also create substantial difficulties. Most employers willingly consent to inspections without a warrant. The Act covers nearly six million workplaces, and the Secretary is currently conducting tens of thousands of inspections yearly with only 1,300 inspectors.<sup>14</sup> In

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tion practice noted in the legislative history itself. See, e.g., Leg. Hist. 401-402 (Sen. Saxbe). And since proof of correctable violations *inter alia* requires a showing that workers had access to hazardous machines or areas, e.g., *Brennan v. Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263-1266 (C.A. 4), on remand, 1975-1976 CCH OSHD Para. 20,448 (February 20, 1976) (not yet officially reported), successful enforcement proceedings may be blocked with relative ease by temporarily disconnecting machines or barricading such areas, if advance notice of an inspector's arrival is obtained.

<sup>13</sup> Agency regulations currently require the Secretary to obtain a court order authorizing entry if the inspector is initially refused entry. See 29 C.F.R. 1903.4. A ruling by this Court that no warrant is required should greatly reduce an employer's incentive to refuse entry. Moreover, since the district courts are always open for compulsory process purposes, Fed. R. Civ. P. 77(a), and there would ordinarily be no cognizable contention in opposition, orders authorizing entry would issue swiftly and routinely in the event of refusals, further reducing the interim available to employers.

<sup>14</sup> Congress repeatedly indicated awareness that qualified inspectors to enforce this Act would be in critically short

these circumstances, requiring inspectors to obtain a warrant before each inspection would place an unwarranted burden on limited judicial and enforcement resources, creating severe delays in implementing inspections, to the detriment of the Act's basic purpose of assuring the swiftest possible abatement of occupational hazards. See, e.g., *Brennan v. Winters Battery Mfg. Co.*, 531 F. 2d 317, 322-323 (C.A. 6), certiorari denied, No. 75-1162 (May 24, 1976).

Moreover, pre-inspection warrants for routine "general schedule" inspections would provide only minimal additional safeguards for an employer's privacy interests. Since the essence of the general schedule inspection is that it is a random spot check, the factors identified in *Camara v. Municipal Court*, *supra*, 387 U.S. at 538-539, as supporting a finding of probable cause for inspection would be largely irrelevant. Here, as in *United States v. Biswell*, *supra*, 406 U.S. at 316: "if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." Accord, *Brennan v. Buckeye Industries*, 374 F. Supp. 1350, 1354 (S.D. Ga.).<sup>15</sup>

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supply for an indefinite time. E.g., S. Rep. No. 91-1282, *supra*, at 12, 21-22, Leg. Hist. 152, 161-162; H.R. Rep. No. 91-1291, *supra*, at 22-31, Leg. Hist. 852-861; H.R. (Conf. Rep.) Rep. No. 91-1765, 91st Cong., 2d Sess. 37 (1970), Leg. Hist. 1190.

<sup>15</sup> Probable cause for inspections based on fatality reports or employee complaints could be established by submitting to the magistrate the fatality report prepared by the employer (29 C.F.R. 1904.8) or the employee complaint, which must in any event be presented to the employer at the time of

Nothing in the decisions of this Court calls for invalidation of the congressional authorization of warrantless OSHA safety inspections. This Court has consistently recognized that the overriding Fourth Amendment test is one of "reasonableness" in the particular circumstances. E.g., *Roaden v. Kentucky*, 413 U.S. 496, 501; *Camara v. Municipal Court*, *supra*, 387 U.S. at 538-539. It has noted that congressional determinations regarding the reasonableness of particular intrusions are entitled to weight in this constitutional area, *United States v. Watson*, 423 U.S. 411; and it has regularly applied that test's balancing of governmental interests against privacy expectations in deciding whether a warrant is required, as well as in identifying the nature of the probable cause needed to support a warrant authorizing an inspection. E.g., *Camara*, *supra*, 387 U.S. at 533; cf. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-270 (plurality opinion); 277-285 (Powell, J., concurring), 288-290 (White, J., dissenting).

Virtually all the factors the Court has found significant in concluding that statutorily authorized inspections (in contrast to the types of searches and seizures that have been the traditional focus of Fourth Amendment concern) may be conducted without a

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the inspection (29 U.S.C. 657(f)(1)). But the warrant procedure in these cases would provide the employer with no more information concerning the reasonableness of the inspection than he is already provided by statute and regulation. See *United States ex rel. Terraciano v. Montanye*, 493 F. 2d 682, 685 (C.A. 2), certiorari denied *sub nom. Terraciano v. Smith*, 419 U.S. 875.

warrant<sup>16</sup>—express congressional authorization, compelling governmental need in light of the particular purpose of the inspection involved, the difficulty of making any meaningful “cause” showing, and limited interference with legitimate privacy expectations<sup>17</sup>—

<sup>16</sup> Similar or identical provisions are included in many federal statutes, e.g., 21 U.S.C. 374(a) (Food, Drug, and Cosmetic Act); 30 U.S.C. 723, 724 (Metal and Nonmetallic Mine Safety Act); 30 U.S.C. 813 (Coal Mine Health and Safety Act); 45 U.S.C. 437(c) (Railroad Safety Act); 8 U.S.C. 1225(a) (Immigration and Nationality Act); 29 U.S.C. 211(a) (Fair Labor Standards Act); 7 U.S.C. (Supp. V) 136g (Environmental Pesticide Control Act); 41 U.S.C. 53 (Walsh-Healey Act); 45 U.S.C. 29 (Railroad Safety Appliance Act); 42 U.S.C. 1857f-6 (Air Pollution Control Act); 7 U.S.C. 2146(a) (Animal Welfare Act of 1970); 46 U.S.C. 239, 362, 404 (Bureau of Marine Inspection Act); 21 U.S.C. 1034(a), (b), (d) (Egg Products Inspection Act); 15 U.S.C. 1270(a), (b) (Federal Hazardous Substances Act); 42 U.S.C. 2035(c) (Atomic Energy Act); Section II, Pub. L. 94-469, 90 Stat. 2032, 15 U.S.C. 2610 (Toxic Substances Control Act); 33 U.S.C. (Supp. V) 467(a) (Water Pollution Control Act); 42 U.S.C. 1857c-9 (Clean Air Act); 26 U.S.C. 7606 (Internal Revenue Code of 1954); 26 U.S.C. 5146(b) (Internal Revenue Act of 1958).

<sup>17</sup> The statute is aimed only at business premises, which have “[h]istorically . . . been subject to broad visitorial power, both in England and in this country.” *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204. Moreover, the inspection is designed only to disclose hazardous working conditions—it relates purely to the regulation of business activities. *G. M. Leasing Corp. v. United States*, No. 75-235, decided January 12, 1977, slip op. 14-15. And, since OSHA inspectors are only to examine areas where employees work, they “do not . . . intrude into any zone of privacy which the [employers] reasonably expect to remain inviolate.” *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 51 (S.D. Ohio). Indeed, at least two courts of appeals have suggested that employers’ privacy expectations in these circumstances are

are present in this case. See *Colonnade Catering Corp. v. United States*, 397 U.S. 72; *United States v. Biswell*, 406 U.S. 311.<sup>18</sup> For this reason those federal courts that have attempted to balance the competing interests have sustained limited warrantless inspections under Section 8(a)<sup>19</sup> and analogous regulatory provisions.<sup>20</sup>

so low as to amount to a lack of Fourth Amendment standing. *Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Review Commission*, 519 F. 2d 1257, 1263 (C.A. 3); *Lake Butler Apparel Co. v. Secretary*, 519 F. 2d 84, 88 (C.A. 5).

<sup>18</sup> Moreover, this case does not involve the circumstances that this Court identified in *Camara* and *See* as indicating that warrantless inspections are unreasonable under the Fourth Amendment in particular situations—blanket authorizations to inspect, lack of notice regarding the inspection’s lawful purpose or scope, and the absence of any indication that a warrant requirement would significantly hamper regulation.

<sup>19</sup> *Brennan v. Buckeye Industries*, 374 F. Supp. 1350 (S.D. Ga.); *Dunlop v. Able Contractors*, Civ. No. 75-57-BLG (D. Mont., December 15, 1975), appeal pending, C.A. 9, No. 76-1615. Contra, *Brennan v. Gibson’s Productions, Inc. of Plano*, 407 F. Supp. 154, 162-163 (E.D. Tex.) (three-judge court), appeal pending, C.A. 5, No. 76-1526; *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627 (D. N.Mex.) (three-judge court), appeal pending, C.A. 10, No. 76-2020; *Usery v. Rupp Forge Co.*, No. C-76-385 (N.D. Ohio, April 22, 1976, appeal pending, C.A. 6, No. 76-1960; *Usery v. Centrif-Air Machine Co.*, No. C-76-1551 (N.D. Ga., January 10, 1977).

<sup>20</sup> *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. Okla.) (Food, Drug and Cosmetic Act); *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio) (Coal Mine Health and Safety Act of 1969); *United States ex rel. Terraciano v. Montanye*, 493 F. 2d 682, 684-685 (C.A. 2), certiorari denied *sub nom. Terraciano v. Smith*, 419 U.S. 875 (state narcotics statute); *United States*

2. Even if, despite our contrary submission, this Court should conclude that the Fourth Amendment precludes warrantless safety inspections of working areas, the district court erred in declaring 29 U.S.C. 657(a) "unconstitutional and void" and enjoining the Secretary from "acting or attempting to act pursuant to or in furtherance of" that Section (App. B, *infra*, pp. 11a-12a). It should instead have followed this Court's rule that "under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment," *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 272, and interpreted the statute to meet Fourth Amendment requirements.<sup>21</sup> Although, as noted, we believe it is clear that Congress intended to authorize warrantless inspections, it is equally clear that interpreting the statute to meet Fourth Amendment requirements more closely approximates congressional intent than totally eliminating the authority to inspect. Cf. *Tilton v. Richardson*, 403 U.S. 672, 684.

3. The uncertainty concerning the Secretary's authority to conduct OSHA inspections is seriously hampering the enforcement of that Act. Accordingly, the Secretary urges that this case be considered on an

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*v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1374-1377 and nn. 12-15 (D. Del.) (Food, Drug and Cosmetic Act); *United States v. Western & A. R. R.*, 297 Fed. 482, 484-485 (N.D. Ga.) (Railroad Safety Appliance Act).

<sup>21</sup> This is the course followed by the other district courts that have found warrantless OSHA inspections unconstitutional. See note 19, *supra*.

expedited schedule that will permit a final decision this Term. To that end, the government will file its brief on the merits by March 15, 1977, and we suggest that if the Court notes probable jurisdiction, the appellees be ordered to file their brief in response no later than April 14, 1977. The case would then be ready for argument during the April Session of the Court.

#### CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

DANIEL M. FRIEDMAN,  
*Acting Solicitor General.*

ALFRED G. ALBERT,  
*Acting Solicitor of Labor,*

BENJAMIN W. MINTZ,  
*Associate Solicitor,*

MICHAEL H. LEVIN,  
*Counsel for Appellate Litigation,*  
*Department of Labor.*

FEBRUARY 1977.

1a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

v.

W. J. USERY, Secretary of Labor of the  
United States of America, in his official  
capacity, ET AL., DEFENDANTS

MEMORANDUM DECISION AND ORDER

Before: KOELSCH and ANDERSON, Circuit Judges,  
and McNICHOLS, Chief District Judge.

ANDERSON, Circuit Judge:

Plaintiff is an Idaho corporation in good standing situated in Pocatello, Idaho. Its business is the installation of electrical and plumbing fixtures, heating and air conditioning units. The corporation is engaged in interstate commerce in that it purchases and uses materials such as sheet metal which are made without the State of Idaho.

On September 11, 1975, Occupational Safety and Health Compliance Officer Daniel T. Sanger arrived at plaintiff's business premises for the purpose of conducting a safety and health inspection pursuant to Section 8(a) of the Occupational Safety and

Health Act. 29 U.S.C. § 657(a).<sup>1</sup> Mr. Sanger properly identified himself and requested permission to inspect the nonpublic area of the premises. Mr. Ferrol G. "Bill" Barlow, President and Manager of Barlow's, Inc., refused to allow the inspection, basing his refusal on the absence of a search warrant. It is undisputed that Mr. Sanger did not have any cause, probable or otherwise, to believe a violation existed nor was he in possession of any complaints by any employee of Barlow's, Inc.

As a result of Mr. Barlow's refusal, the Secretary petitioned this court on December 13, 1975, for an order compelling entry, inspection and investigation. A show cause order was thereafter issued and subsequent to the show cause hearing the Secretary's petition was granted on December 30, 1975.

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<sup>1</sup> 29 U.S.C. § 657(a) states:

"(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

On January 5, 1976, the court's order was presented to Mr. Barlow. Mr. Barlow again declined to permit the inspection. The next day the plaintiff filed the instant action requesting that a three-judge court be convened to enjoin the enforcement of the Act on the ground of repugnance to the Fourth Amendment and, further, requesting a temporary restraining order. The present three-judge court<sup>2</sup> was empaneled and the temporary restraining order was denied on the ground of an inadequate showing of immediate and irreparable injury.

This case squarely presents the issue of whether the entry and inspection provisions of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651, et seq., are consistent and compatible with the dictates of the Fourth Amendment.<sup>3</sup>

## I.

Preliminarily, the Secretary advances two grounds to preclude this panel from reaching a decision on

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<sup>2</sup> During the pendency of these proceedings Judge Koelsch took senior status and Judge Anderson was elevated from district judge to circuit judge and continues to participate in this matter by designation of the Chief Judge of the Ninth Circuit.

### <sup>3</sup> AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the merits. First, it is contended that this court lacks subject matter jurisdiction. This argument is premised on two principles: First, that judicial review is improper because Congress has designated an exclusive forum—the Occupational Safety and Health Administration, and, second, that plaintiff is not entitled to challenge agency action for a supposed or threatened injury until prescribed administrative proceedings have been exhausted. In short, the Secretary contends that plaintiff should simply have permitted a full inspection under protest, thereby preserving its objections for the Commission and appellate courts, if and when a citation resulting from the inspection is actually issued against it.

The purposes served by the exhaustion doctrine, as set forth in *McKart v. United States*, 395 U.S. 185 (1969), are absent from this case and we therefore will not apply the rule to this case. It is beyond question that the administrative channels of OSHA lack the expertise to consider and determine the constitutional question presented by this case. We also find, after a consideration of the factors set forth in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), that the issue presented by this case is ripe for judicial determination. The issue presented is one of constitutional law only and, further, the plaintiff is placed in a dilemma of being forced to give up his asserted right of privacy or potentially finding himself in contempt of court. We therefore reject the secretary's contention that this court lacks subject matter jurisdiction.

The Secretary's second ground urged in support of dismissal is that plaintiff's failure to appeal the order of December 30, 1976, requiring the inspection bars the present action on res judicata grounds. Our review of the transcript of that hearing convinces us that the presiding judge reserved the constitutional issue on the basis that it was premature. The ruling in that case, Civil 4-75-58, clearly left open the door for subsequent litigation of the Fourth Amendment claim. We thus proceed to the merits.

## II.

In *Frank v. Maryland*, 359 U.S. 360 (1959), the Supreme Court upheld the conviction of Aaron D. Frank who refused to permit a Baltimore City health inspector to enter and inspect his premises without a search warrant. This holding was expressly overruled by the Supreme Court in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) and its companion case, *See v. City of Seattle*, 387 U.S. 541 (1967). In *Camara* appellant was awaiting trial on criminal charge of violating the San Francisco Housing Code by refusing to give permission to a city housing inspector who sought to inspect appellant's residence without a warrant. The court, in tracing the history and scope of the Fourth Amendment, stated:

"Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreason-

able' unless it has been authorized by a valid search warrant." 387 U.S. at 528-29 [citations omitted].

The court went on to hold that under the Fourth Amendment a person has the constitutional right to insist that a search warrant be obtained before an administrative inspection of a private residence is allowed.

In *See, supra*, the court was faced with a warrantless inspection of a commercial warehouse in the course of a municipal fire, health and housing program. In expanding its *Camara* holding to include commercial structures as well as private residences, the court stated:

"We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. at 545.

In *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), the court narrowed the scope of its *Camara* holding in upholding the warrantless inspection of the premises of a retail dealer of liquor. In *United States v. Biswell*, 406 U.S. 311 (1972), the *Colonnade* reasoning was expanded to permit warrantless inspections of firearms dealers.

### III.

It is upon the framework of the above-mentioned cases that we must base our decision. We reject the notion as espoused in *Brennan v. Buckeye Indus-*

*tries, Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974), that the *Colonnade* and *Biswell* decisions envision a trend of the Supreme Court to generally narrow the holdings of *Camara* and *See*. Instead, we find that the warrantless inspection scheme pursuant to OSHA is more properly aligned with and must be controlled by the holdings in *Camara* and *See, supra*. See *Brennan v. Gibson's Products, Inc. of Plano*, 407 F. Supp. 154 (Three-judge court, E. D. Texas, 1976).

We simply cannot overlook the fact that in *Colonnade* and *Biswell* the court dealt with an "industry long subject to close supervision and inspection" (*Colonnade*, 397 U.S. at 77), and a "pervasively regulated business" (*Biswell*, 406 U.S. at 316). We believe that both of those cases fit into the *Camara* categorization of "certain carefully defined classes of cases." We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce. 29 U.S.C. § 651(a)(3). As such, it applies to a wide variety of over 6,000,000 work places and does not focus on one particular type of business or industry. It cannot be questioned that this broad spectrum of businesses can be distinguished from the heavily-regulated liquor and firearm industries encountered in *Colonnade* and *Biswell, supra*.<sup>4</sup>

<sup>4</sup> The Congressional investigations revealed in the legislative history of the Act (3 U.S. Code Congressional and Administrative News, 91st Congress, Second Session, 1970, p. 5177, et seq.) make a persuasive case for "need" in the health and safety fields. We, of course, do not sit in judgment of the wisdom of Congress. Our only concern is the alleged affront to the Fourth Amendment. The rationale of an anonymous

We have also had the benefit, not enjoyed by the court in *Brennan v. Buckeye Industries, Inc.*, *supra*, of recent Supreme Court pronouncements which show a continued allegiance to the *Camara* and *See* holdings as expressing the court's views on the scope of the Fourth Amendment. In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the court was faced with a statute and regulations which permitted warrantless searches for aliens, without probable cause, within a one hundred mile zone along the international border. The court invalidated these roving searches by the Immigration and Naturalization Service, finding that such searches:

"embodied precisely the evil the court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by ob-

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saying "Expediency is the argument of tyrants, it precedes the loss of every human liberty" seems of forceful application here. That the end result may be laudable and desirable does not justify the means used to accomplish it when constitutional prohibitions are confronted. To paraphrase Burke, *Impeachment of Warren Hastings*, February 16, 1788; "The Constitution (law) and arbitrary power are in eternal omnia." We suggest that there are other less intrusive and oppressive methods of accomplishing the intended result, e.g., employer reporting requirements with provisions for employee contribution and participation; employer-employee safety committees; encouragement of employee complaints; in the organized management-labor relations field a greater and more forceful input by labor unions as the safety representative of their members; efforts toward better enforcement by the states of their health and safety laws, etc. We subscribe to the *Camara* court holding that warrantless inspections must be confined to "certain carefully defined classes of cases." *Camara, supra*, p. 528-9.

taining a warrant prior to the inspection." 413 U.S. at 270.

The court went on to distinguish *Colonnade* and *Biswell* by noting that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, . . ." 413 U.S. at 271.

More recently, in *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), an inspector of the Colorado Department of Health conducted daylight visual pollution tests of smoke being emitted from the company's chimney. The inspector had entered the outdoor premises of the business without the owner's consent or having obtained a search warrant. The court expressly reaffirmed the holdings of *Camara* and *See*, but held them inapplicable to the case because of the "open fields" doctrine. See *Hester v. United States*, 265 U.S. 57 (1924).

There is one common thread among these cases that requires the result we reach here. In *Camara*, *See* and *Western Alfalfa*, *supra*, each was involved with statutory and regulatory schemes aimed at promoting and protecting public health and safety. The warrantless inspections authorized under OSHA likewise seek to promote public health and safety and therefore must be controlled by *Camara* and *See*.

The analysis which we have outlined above is consistent with that taken by another three-judge panel in *Brennan v. Gibson's Products, Inc. of Plano*, *supra*. While we adopt, in general, the similar reasoning

employed there, we decline the invitation to judicially redraft an enactment of Congress. Unlike the *Gibson's Products* court, we cannot accept the proposition that the language of the OSHA inspection provisions envision the requirement that a warrant be obtained before any inspection is undertaken. Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty.

#### IV.

We therefore hold that the inspection provisions of OSHA which have attempted to authorize warrantless inspections of those business establishments covered by the Act, are unconstitutional as being violative of the Fourth Amendment.

IT IS SO ORDERED and judgment shall be entered accordingly.

DATED this 30th day of December, 1976.

/s/ M. Oliver Koelsch per JBA  
M. OLIVER KOELSCH  
Senior Circuit Judge

/s/ J. Blaine Anderson  
J. BLAINE ANDERSON  
United States Circuit Judge

/s/ Ray McNichols per JBA  
RAY MCNICHOLS, Chief  
United States District Judge

#### APPENDIX B

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

W. J. USERY, Secretary of Labor of the  
United States of America, in his official  
capacity, ET AL., DEFENDANTS

#### SUMMARY JUDGMENT

The cross motions of the parties for summary judgment having been heard and submitted and the court having heretofore entered its memorandum decision and order, and it appearing that there are no genuine material issues of fact and that the record in this cause presents only questions of law, and the court having concluded that plaintiff is entitled to the relief prayed for in its complaint on file herein,

IT IS HEREBY ORDERED, ADJUDGED and DECLARED as follows:

#### I.

That Section 8(a) of Public Law 91-596, December 29, 1970, 84 Stat. 1598 (29 U.S.C. 657(a)), is unconstitutional and void in that it directly offends

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against the prohibitions of the Fourth Amendment of the Constitution of the United States of America.

II.

That defendant, the Secretary of Labor of the United States of America, and all other defendants, and their successors in office, and all other persons acting by, through or under them, are hereby forever and permanently RESTRAINED and ENJOINED from acting or attempting to act pursuant to or in furtherance of Section 8(a) of OSHA (29 U.S.C. 657(a)) and from conducting or attempting to conduct any general searches or inspections of the non-public portions of the premises of the plaintiff herein pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970.

III.

No costs or attorneys' fees are allowed.

DATED this 30th day of December, 1976.

/s/ M. Oliver Koelsch per JBA  
M. OLIVER KOELSCH  
Senior Circuit Judge

/s/ J. Blaine Anderson  
J. BLAINE ANDERSON  
Circuit Judge

/s/ Ray McNichols per JBA  
Chief District Judge

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APPENDIX C

WILBUR T. NELSON  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

W. J. USERY, Secretary of Labor of the  
United States of America, in his official  
capacity, ET AL., DEFENDANTS

NOTICE OF APPEAL

COME NOW the Defendants by and through the  
United States Attorney for the District of Idaho and  
pursuant to 28 U.S.C. 1252 and 1253 appeal to the

14a

United States Supreme Court from the Memorandum Decision and Order and Summary Judgment entered on December 30, 1976, in the above-captioned matter.

WILBUR T. NELSON  
United States Attorney

By /s/ Paul L. Westberg  
PAUL L. WESTBERG  
Assistant United States  
Attorney

[Filed January 4, 1977]

15a

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

*vs.*

W. J. USERY, Secretary of Labor of the  
United States of America, in his official  
capacity, ET AL., DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the District of Idaho and is a person of such age and discretion as to be competent to serve papers.

That on January 4, 1977, I Paul L. Westberg, served a copy of the Notice of Appeal on Runft and Longeteig, Attorneys at Law, 420 West Bannock Street, Boise, Idaho 83701 by depositing same in the United States mail at Boise, Idaho.

/s/ Paul L. Westberg  
Assistant United States  
Attorney

16a

Subscribed and sworn to before me this 4th day  
of January, 1977.

/s/ Mikel H. Williams  
Notary Public  
Residing at Boise, Idaho  
My Commission expires:

Supreme Court, U. S.

FILED

JUN 2 1977

CLERK

**APPENDIX**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

**No. 76-1143**

**RAY MARSHALL, SECRETARY OF LABOR, ET AL.,**  
*Appellants*

—v.—

**BARLOW'S, INC.**

**ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO**

**JURISDICTIONAL STATEMENT FILED FEBRUARY 17, 1977  
PROBABLE JURISDICTION NOTED APRIL 18, 1977**

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-1143**

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
*Appellants*

—v.—

BARLOW'S, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO

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## DOCKET ENTRIES

DATE	PROCEEDINGS
1976	
Jan. 6	Complaint.
Jan. 6	Exparte Mo. for restraining order
Jan. 6	Affidavit in support of temporary restraining order
Jan. 6	Memo of points & authorities in support of pltfs application for 3 Judge panel.
Jan. 6	Issued Summons
Jan. 8	Motion for order to show Cause.
Jan. 8	Affidavit in support of mo. for temporary injunction.
Jan. 8	Certificate of Service
Jan. 8	Order to show Cause—Jan 16/76 @ 10:00 A.M. (JBA)
Jan. 15	Deft's. response to Order to show cause dated 1/8/76.
Jan. 15	Affidavit in support of preliminary injunction.
Jan. 15	Memo in support of plffs. application for a 3 judge panel & Mo. for preliminary injunction.
Jan. 16	Record of hearing; Judge Anderson to request 3 judge court on constitutional issue. Temporary rehearing order not issued. (JBA)
Jan. 16	Order denying Temporary Restraining order (JBA)
Jan. 19	Notification 2nd certificate requesting formation of 3-Judge court (JBA) cc: Runft; Westberg.
Jan. 21	Summons—all Defs. served by 1/14/76 except Def. Stender
Mar. 8	Motion and Order allowing Defs. until 3/19/76 to Answer (JBA) w/Clerk's Cert. of Mailing.

DATE	PROCEEDINGS
Mar. 19	Motion by Defs. to Dismiss for lack of subj. matter Jurisd. or in alternative, Mo. for S.J.
Mar. 19	Memo. of Defs. in support of Motion to Dismiss or for S.J.
Mar. 19	Cert. of Service by Mail cc: Judges Koelsch; McNichols; Anderson
Apr. 5	Motion of Ptff. for enlargement of time to respond
Apr. 5	Stip. re: extension of time
Apr. 5	Order allowing Ptff. until 4/12/76 to respond to Defs. Mo. to Dismiss (RM) cc: 3 Judges; 3 cc: Runft
Apr. 14	Motion for Summary Judgment by Ptff. w/Cert. of Mailing
Apr. 14	Memo. of Points & Authorities in oppo. to Defs' Motions for Dismissal and in support of Ptff's Motion for S.J.
Apr. 30	Exparte Motion & Order allowing Defs. until 5/21/76 to respond to Ptff's Mo. for S. J. (RM)
May 24	Memo. of Defs. in oppo. to Ptff's Mo. for S.J. & in reply to Ptff's oppo. to Defs' Mo. to Dismiss or for S.J. cc: to all 3 Judges
Jun. 18	Suppl. Memo of Authorities. (Ptf) CC: 3 Judges
Jun. 21	Request by Ptf. that Court take judicial notice of transcript of CIV 4-75-58. cc: 3 Judges
Jun. 25	Record of 3 Judge Hearing; Defs' Mo. to Dismiss or for S.J. and Ptff's Mo. for S.J. taken under Advisement. (RM) (JBA) (MOK)
Jul. 26	Suppl. Memo. of Authority w/attached CCM to 3 Judges
Sept. 21	Second supplemental memo of points & authority in support of plff's motion for summary judgment; cc: 3 judges

DATE	PROCEEDINGS
Oct. 29	Third Suppl. of Memo. of Points & Auth. of Ptff.
Dec. 30	Memo. Decision and Order (MOK): (JBA): (RM)
Dec. 30	Summary Judgment Granting Perm. Restraining Order against all Defs. w/ no costs of atty. fees allowed. (MOK) (JBA) (RM) cc: all 3 Judges; U.S. Atty.; Runft
1977	
Jan. 4	Notice of Appeal to the Supreme Court
Jan. 4	Certificate of Service of Notice of Appeal
Jan. 4	Motion to Suspend and Stay Enforcement of Injunction
Jan. 4	LODGED Order Granting Motion for Suspension and Stay of Injunction Pending Appeal
Jan. 5	Certificate of Service by Mail of lodged Motion & Order cc of Jan 4 & 5 filings to 3 Judges
Jan. 10	Order Denying Mo. for Stay (MOK) (JBA) (RM) w/ attached CCM cc: all 3 Judges by JBA's Secretary
Jan. 10	Memo. of Ptff. in oppo. to Mo. to suspend & Stay enforcement of Injunction. cc: all 3 Judges
Jan. 25	Order Correcting Memo. Decision (JBA) w/ CCM
Jan. 31	Supreme Court Order staying Judgment outside of Idaho c/ 3 Judges
Feb. 07	Cert. copy of Supreme Court Order Staying Idaho Dist. Court Order of 12/30/76 except as to Appellee Barlow (Justice Rehnquist)
Apr. 25	Supreme Court Order (certified copy) noting Probable Cause cc: all 3 Judges

**RUNFT & LONGETEIG CHARTERED**

ATTORNEYS AND COUNSELORS AT LAW

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Boise, Idaho 83701

Telephone (208) 345-6521

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

Civil No. 1-76-3

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

—vs—

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

**COMPLAINT**

COMES NOW the plaintiff and for a cause of action against the defendants, complains and alleges as follows:

**I.**

This Court has original jurisdiction of this action, and the plaintiffs bring this action, under and pursuant to 28 U.S.C. Section 1337. Based on this jurisdiction, temporary and permanent injunctory relief is sought by plaintiff pursuant to 28 U.S.C. Sections 2282 and 2284 to restrain the enforcement, operation and/or execution of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. Section 651, et seq., as applied to plaintiff herein.

**II.**

Plaintiff is an Idaho corporation in good standing under and pursuant to the laws of the State of Idaho, with its principal place of business located at 225 West Pine Street, Pocatello, Idaho.

**III.**

The defendant JOHN T. DUNLOP is the duly appointed, qualified and acting Secretary of Labor of the United States of America, and as such, administers and directs the Occupational Safety and Health Administration of the United States Department of Labor under and pursuant to the provisions of the Occupational Safety and Health Act of 1970, as amended, hereinafter referred to as "the Act", and under and pursuant to rules and regulations promulgated pursuant to the Act.

**IV.**

The defendant JOHN H. STENDER is the Assistant Secretary of the United States Department of Labor for Occupational Safety and Health, and as such, is the chief administrator under the Secretary of Labor, responsible for the enforcement, operation and/or execution of the Act and rules and regulations promulgated pursuant thereto.

**V.**

The defendant JAMES W. LAKE is the Regional Director of the United States Department of Labor Occupational Safety and Health Administration, hereinafter referred to as "OSHA", for Federal Region 10 comprising the states of Washington, Oregon, Idaho and Alaska.

**VI.**

The defendant RICHARD C. JACKSON is the Area Director of OSHA for Southern Idaho, and in that capacity directs the day to day administration of OSHA in Southern Idaho, including Pocatello, Idaho.

## VII.

This action is brought against the aforementioned defendants in their respective official capacities, including any of their respective predecessors, successors and agents.

## VIII.

The facts and legal issues involved in this action conform to the requirements set forth in 28 U.S.C. Sections 2282 and 2284 for the convening of a District Court of three judges to adjudicate this matter.

## IX.

As set forth in 29 U.S.C. Section 651, Congress declared that the Act was enacted and promulgated "through the exercise of its powers to regulate commerce among the several states . . .". 29 U.S.C. Section 657 purports to authorize the Secretary of Labor and his agents to enter any factory, plant, business, or other place of employment without delay and conduct a general search and inspection of all materials, equipment, and records therein without first obtaining a search warrant.

## X.

On September 11, 1975, an agent of defendants was denied permission by plaintiff to conduct a routine OSHA search and inspection of plaintiff's business premises. At this time defendants' agent advised plaintiff's president, Ferrol G. "Bill" Barlow, of the provisions of 29 U.S.C. Section 657, and he further advised Mr. Barlow that he was there to conduct such a search and investigation as so provided by the Act. Defendants' agent also advised Mr. Barlow that he had received no complaints regarding the health or safety conditions of plaintiff's business premises, and that he possessed no information giving him probable cause to believe that any violations of the Act existed upon or were occurring within plaintiff's said business premises. Plaintiff, through Mr. Barlow, denied defendants' agent permission to enter plaintiff's business premises at that time. Concurrently there-

with, plaintiff, through Mr. Barlow, advised defendants' agent that the denial of entry was based solely on constitutional grounds and that no entry into plaintiff's premises would be allowed for the reason that defendants' agent did not have a search warrant.

## XI.

At an Order to Show Cause Hearing on December 30, 1975, in the matter of Establishment Inspection of: Barlow's, Inc., 225 West Pine, Pocatello, Idaho, Civil No. 4-75-58, the United States District Court entered an order authorizing and directing defendants to conduct an "inspection and investigation" upon plaintiff's business premises forthwith pursuant to the provisions of 29 U.S.C. § 657 and the regulations promulgated pursuant thereto at 29 C.F.R. part 1903, and further ordering that Barlow's, Inc., its agents, and employees are enjoined and restrained from interfering therewith. A form of this order so entered by the District Court on December 30, 1975, is attached hereto for reference as Exhibit "A".

## XII.

Under the factual circumstances of this case the imminent application and enforcement by defendants of the provisions of 29 U.S.C. § 657 and the regulations at 29 C.F.R. part 1903 operate to place plaintiff in imminent danger of violation and deprivation of certain of its constitutional rights:

- (1) Such application and enforcement of the Act and regulations will deprive plaintiff, a non-public business, of its right of privacy in violation of the provisions of the Fourth and Fifth Amendments to the United States Constitution;
- (2) Such application and enforcement of the Act and regulations will violate plaintiff's right to be secure against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution;

(3) Such application and enforcement of the Act and regulations without probable cause to believe, sufficient to support a warrant, that the purposes and standards of the Act are being violated on plaintiff's premises will violate plaintiff's right to due process of law in violation of the Fifth Amendment to the United States Constitution.

### XIII.

The threat to plaintiff's constitutional rights is imminent, substantial and irreparable, since, if not immediately enjoined, defendants, pursuant to court order, shall forthwith violate plaintiff's constitutional rights by making an unwarranted, unreasonable entry onto plaintiff's premises, which entry plaintiff and its agents can prohibit only on pain of contempt of court. Defendants and their agents should be immediately restrained, and temporarily and permanently enjoined from making the imminent warrantless search and inspection of plaintiff's premises.

### XIV.

The Act and regulations promulgated pursuant thereto constitute a violation of the doctrine of separation of powers between the legislative branch and the judicial branch as set forth in Article I and Article III of the United States Constitution. By this Act and the regulations, Congress has unconstitutionally usurped the power of the judiciary by legislating probable cause. Due process of law is violated whenever probable cause is not determined in each separate case or controversy, as in judicial determination thereof.

### XV.

It has been necessary for plaintiff to obtain legal services, and plaintiff has engaged the law firm of Runft & Longeteig, Chartered, to maintain this action on its behalf. In the event that plaintiff should prevail in this action against defendants, then plaintiff is entitled to an award of reasonable attorneys' fees.

WHEREFORE, plaintiff prays as follows:

1. That this Court immediately enter a temporary restraining order prohibiting defendants from applying, enforcing or executing the Act and the regulations promulgated pursuant thereto, or any portion of the Act or regulations, against plaintiff;

2. That, pending final adjudication of this matter, a temporary injunction be entered enjoining and restraining the application, enforcement, operation or execution of this Act and the regulations promulgated pursuant thereto, or any part of the Act or said regulations, against plaintiff;

3. That a permanent injunction restraining and enjoining the application, enforcement, operation and execution of the Act and the regulations promulgated pursuant thereto, or any portion of the Act or said regulations, against the plaintiff;

4. That this Court take jurisdiction of this cause of action and convene a District Court of three judges to adjudicate this cause of action pursuant to 28 U.S.C. §§ 2282 and 2284;

5. That jurisdiction be taken of this matter by a three judge District Court and that such Court be empaneled to hear and determine this case, accordingly;

6. That plaintiff be awarded its attorneys' fees and costs reasonably incurred in this lawsuit;

7. That plaintiff be granted such other and further relief as the proper Court may deem just.

Dated this 6th day of January, 1976.

RUNFT & LONGETEIG, CHARTERED

By /s/ John L. Runft  
JOHN L. RUNFT, of the Firm  
Attorneys for Plaintiff

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing COMPLAINT on MARION J. CALLISTER, UNITED STATES ATTORNEY, District of Idaho, by delivering same to Room 698, Federal Building, 550 West Fort Street, Boise, Idaho 83724, this 6th day of January, 1976.

/s/ John L. Runft  
JOHN L. RUNFT

RUNFT & LONGETEIG CHARTERED  
ATTORNEYS AND COUNSELORS AT LAW  
P.O. Box 953  
420 West Bannock Street  
Boise, Idaho 83701  
Telephone (208) 345-6521

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

# EX PARTE MOTION FOR RESTRAINING ORDER

COMES NOW Plaintiff and moves this honorable Court for a Temporary Restraining Order enjoining and restraining defendants and their agents and employees from enforcing the provisions of 29 U.S.C. § 657 and the pertinent regulations promulgated pursuant thereto at 29 C.F.R. part 1903, on the grounds and for the reasons that plaintiff is in imminent danger of having its constitutional rights of due process, privacy, and security from unreasonable search and seizure irrevocably violated. Whereas plaintiff is in imminent jeopardy of having its constitutional rights violated, there is no urgent reason demanding immediate application and enforcement of the Act and regulations by defendants, as can be

readily seen from the delay in bringing the Order to Show Cause proceedings following the inspection. On the other hand, each time constitutional rights are violated, such violation is irreparable—even though perhaps not compensatory in great sums for actual damages.

Plaintiff further moves this honorable Court that defendants be so restrained until a hearing on plaintiff's motion for temporary injunction can be determined by the full court of three judges.

This motion is based upon the complaint on file herein and the affidavit of attorney John L. Runft filed herein in support hereof.

Dated this 6th day of January, 1976.

RUNFT & LONGETEIG, CHARTERED

By /s/ John L. Runft  
JOHN L. RUNFT, of the Firm

RUNFT & LONGETEIG CHARTERED  
ATTORNEYS AND COUNSELORS AT LAW  
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Boise, Idaho 83701  
Telephone (208) 345-6521

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

AFFIDAVIT IN SUPPORT OF TEMPORARY RESTRAINING ORDER

STATE OF IDAHO     )  
                              ) ss.  
COUNTY OF ADA     )

JOHN L. RUNFT, being first duly sworn on oath, deposes and says:

1. Your affiant is a member of the firm of Runft & Longeteig, Chartered, and is one of the attorneys personally involved in prosecuting the subject case. Your affiant has been in frequent telephonic contact with plaintiff's president, Mr. Ferrol G. "Bill" Barlow and has reviewed the facts of this matter with him in considerable detail.

2. Your affiant is informed and believes that on September 11, 1975, OSHA Compliance Officer, T. Daniel Sanger under orders from his Area Director, Mr. Richard Jackson, went to plaintiff's place of business at about 11:00 o'clock a.m. of that day. Your affiant is informed and believes that the purpose of Mr. Sanger's visit to plaintiff's place of business at 225 West Pine Street, Pocatello, Idaho, was to conduct a search and inspection pursuant to 29 U.S.C. § 657, all as is set forth in Mr. Sanger's affidavit, a copy of which is attached hereto and by this reference made a part hereof, except to the extent it disagrees with the facts set forth herein.

3. Your affiant is informed and believes that Mr. Sanger was met upon his arrival at plaintiff's business premises by Mr. Ferrol G. "Bill" Barlow, who was the president and owner of plaintiff. Mr. Sanger presented his OSHA credentials to Mr. Barlow and requested permission to enter the business premises of plaintiff. Mr. Sanger advised Mr. Barlow of the purpose and authority for his visit, however, Mr. Barlow denied him permission to enter plaintiff's premises at that time.

4. Your affiant is informed and believes that Mr. Barlow inquired of Mr. Sanger as to whether he had any complaint or other "probable cause" to believe that there was any violation of OSHA standards in plaintiff's premises; that Mr. Sanger replied that he had not received any such complaints and had no such information as to any specific violations in plaintiff's place of business; that Mr. Barlow thereupon advised Mr. Sanger that he was denying Mr. Sanger entry into the premises of the plaintiff for the reason that Mr. Sanger did not possess a search warrant and that he, Mr. Barlow, was exercising his constitutional rights in prohibiting such warrantless entry. Mr. Barlow did inform Mr. Sanger that a search warrant would be honored.

5. Your affiant is informed and believes that plaintiff is engaged in the business of metal fabrication and that a foundry is located upon the premises; that plaintiff deals in certain hardware goods, such as mirrors, plumbing fixtures and other household hardware items.

6. The firm of Runft & Longeteig, Chartered, was retained by plaintiff on or about December 23, 1975. Your affiant attended a show cause hearing on behalf of plaintiff in the matter of Establishment Inspection of: Barlow's, Inc., 225 West Pine Street, Pocatello, Idaho, Civil No. 4-75-58, on December 30, 1975, at 3:00 o'clock p.m. before the United States District Court in Boise, Idaho. At the conclusion of this Order To Show Cause Hearing, the Court ordered and directed defendants to conduct a search and investigation as provided by 29 U.S.C. § 657 and applicable regulations within five working days from the date of the order and restrained and enjoined plaintiff, its agents and employees from interfering with such inspection and investigation so authorized by the Court's order.

7. Your affiant is informed and believes that unless defendants are immediately restrained from applying and enforcing the provisions of 29 U.S.C. § 657 and the relevant regulations, plaintiff's rights to security from search, right of privacy and right to due process will be violated unless plaintiff chooses to attempt to defend these rights by means of risking contempt of court.

Dated this 6th day of January, 1976.

/s/ John L. Runft  
JOHN L. RUNFT

SUBSCRIBED AND SWORN TO before me this 6th day of January, 1976.

/s/ Norma J. Hunt  
Notary Public for Idaho  
Residing at Boise, Idaho.

MARION J. CALLISTER  
 UNITED STATES ATTORNEY  
 DISTRICT OF IDAHO  
 Room 693, Federal Building, Box 037  
 550 West Fort Street  
 Boise, Idaho 83724  
 Telephone—342-2711, Ex. 2211

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF IDAHO

Civil No. 4 75 58

IN THE MATTER OF  
 ESTABLISHMENT INSPECTION OF:

BARLOW'S INC.  
 225 West Pine  
 Pocatello, Idaho

COUNTY OF BANNOCK     )  
                                   ) ss.  
 STATE OF IDAHO         )

AFFIDAVIT OF T. DANIEL SANGER

T. Daniel Sanger, being duly sworn, hereby deposes, states and says as follows:

1. That affiant is a Compliance Officer and representative of the Occupational Safety and Health Administration, United States Department of Labor, under the direct supervision of Mr. Richard Jackson, Area Director, Boise, Idaho, office.

2. That on or about September 11, 1975, at approximately 11:00 a.m., I arrived at the business premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho. The purpose of my visit to this place of business was to conduct a safety and health inspection pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (hereinafter referred to as the Act). Present at my

arrival was Mr. Bob Barlow, believed to be the President and Owner of Barlow's Inc. I presented to Mr. Bob Barlow appropriate credentials which designated me as a representative of the Occupational Safety and Health Administration, U.S. Department of Labor. I then requested that Mr. Barlow permit me to enter the company worksite located at 225 West Pine, Pocatello, Idaho, to conduct the aforesaid inspection and advised Mr. Barlow of the pertinent provisions of Section 8(a) of the Act which contain the statutory authority for the making of such inspection. I was denied permission to enter those premises by Mr. Barlow at that time. Said denial of entry was not refused by him by reason of any alleged unreasonableness in time, limit, manner, or any other basis provided for in the Act. Instead, I was advised by Mr. Barlow that my entry was denied because I did not possess a Warrant and that it was his right as a citizen to due process and that a Warrant was necessary before he would permit me to make the inspection.

3. That from my personal observation of the said business premises and my conversation with Mr. Barlow on September 11, 1975, I state that on September 11, 1975, the nature of the business is believed by me to have been sheet metal fabrication shop and some limited hardware goods, such as mirrors, plumbing fixtures and household hardware items; that the business utilized sheet metal which is produced only by means of a steel rolling mill; and that the business employed approximately 15 persons. From my own knowledge, I know that there are no steel rolling mills situated within the State of Idaho.

Dated this 3 day of December, 1975.

/s/ T. Daniel Sanger  
T. DANIEL SANGER  
Compliance Officer  
Occupational Safety and  
Health Adm.  
U.S. Department of Labor—  
Room B-17  
Federal Building &  
U.S. Courthouse  
150 South Arthur  
Pocatello, Idaho 83201

Subscribed and sworn to before me this 3 day of December, 1975.

/s/ [Illegible]  
Notary Public  
Residing at Pocatello Idaho  
My commission expires on  
3 July 78

RUNFT & LONGETEIG CHARTERED  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1 76 3

[Filed Jan. 8, 1976]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

MOTION FOR ORDER TO SHOW CAUSE

COMES NOW the plaintiff pursuant to 28 U.S.C. §§ 2282 and 2284 and Rule 65 of the Federal Rules of Civil Procedure, and moves this Honorable Court for an order directed to defendants to show cause why a three judge district court pursuant to 28 U.S.C. §§ 2282 and 2284, should not be convened in this matter and to show cause why defendants and their agents should not be temporarily and until trial on the merits or other disposition of this matter by a three judge district court, enjoined and restrained from enforcing the provisions of 29 U.S.C. § 657, the pertinent regulations promulgated pursuant thereto at 29 C.F.R. part 1903, and from en-

forcing this Court's Order in the matter of Establishment Inspection of Barlow's, Inc., 225 West Pine, Pocatello, Idaho, Civil No. 4-75-58, entered on December 31, 1975, which Order was granted pursuant to said aforementioned law and regulations, and which Order authorized and directs an OSHA search and inspection of plaintiff's business premises and restrains plaintiff from preventing or interfering with said search and inspection.

This Motion is brought upon the grounds and for the reasons that plaintiff's constitutional rights to privacy, due process and to be free from unreasonable search and seizure will be irrevocably and irreparably violated by the search and inspection of plaintiff's premises ordered by the Court in Civil No. 4-75-58 and by other similar application of 29 U.S.C. § 657 and pertinent regulations. This Motion is based upon pleadings on file herein, and upon the affidavit of plaintiff's counsel, and Memorandum of Points and Authorities in Support of Plaintiff's Application for Three Judge District Court Panel, all of which were filed herein on January 6, 1976.

DATED: This 7th day of January, 1976.

RUNFT & LONGETEIG, CHARTERED

By /s/ John L. Runft  
JOHN L. RUNFT, of the Firm  
Attorneys for Plaintiff

MARION J. CALLISTER  
UNITED STATES ATTORNEY  
District of Idaho  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

[Filed Jan. 16, 1976]

BARLOW'S, INC., an Idaho Corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States  
of America, in his official capacity; et al., DEFENDANTS

ORDER

This matter having come before the Court upon this Court's Order to Show Cause entered on January 8, 1976, directing the Defendants to show cause why a Three Judge District Court panel should not be convened and why a temporary injunction should not be ordered in the premises, and the Court having taken judicial notice of the case *In The Matter of Establishment Inspection of Barlow's Inc.*, 225 West Pine, Pocatello, Idaho, Civil No. 4-75-58, in the United States District Court for the District of Idaho, and a hearing having been held pursuant to that Order on January 15, 1976, before this Court whereat the Plaintiff was represented by Mr. John L. Runft of the firm Runft and Longeteig, Chartered, Boise, Idaho, and the Defendants were represented by Paul L. Westberg, Assistant United States Attorney for the District of Idaho, Boise, Idaho, and the Court being fully advised in the premises, it hereby:

ORDERS, ADJUDGES AND DECREES that the Plaintiff has sufficiently shown that substantial ground for believing that the Occupational Safety and Health Act of 1970 is repugnant to the Constitution of the United States and that, therefore, this District Judge will forthwith request that the Chief Judge of the Ninth Circuit Court of Appeals shall empanel a three-judge court to hear and determine this action. The Court relies upon the case *See v. Seattle*, 387 U.S. 541 (1967), and in particular parts 1, 3, and 4 of the majority opinion therein in finding such sufficient showing in the instant case.

It is further ordered, adjudged and decreed that the Plaintiff's Motion for a Preliminary Injunction, amended to become a Motion for Temporary Restraining Order, be denied because it is not manifestly apparent to this Court that the Plaintiff is likely to prevail upon the merits of the case and that, further, the Plaintiff has failed to make an adequate showing of immediate and irreparable injury should the temporary restraining order not be issued. In this regard, the Court relies upon the expectation that the Department of Labor and Department of Justice will be reluctant to pursue contempt proceedings against the Plaintiff in Civil No. 4-75-58 mentioned above.

Dated this 16th day of January, 1976.

/s/ J. Blaine Anderson  
Judge, U.S. District Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

[Filed Jan. 19, 1976]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

NOTIFICATION AND CERTIFICATE

TO: THE HONORABLE RICHARD H. CHAMBERS,  
CHIEF JUDGE, COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Pursuant to the provisions of 28 U.S.C. § 2284, you are notified that the complaint now pending in the above cause challenges the constitutionality of the Occupational Safety and Health Act, Public Law 91-596, particularly 29 U.S.C. § 657. Injunctive relief is sought.

I certify that I have examined the complaint, the affidavits and the briefs and have considered oral argument of counsel, and that, in my opinion, this challenge requires the formation of a district court of three judges composed as designated in the above-mentioned statutory provisions.

January 16, 1976

/s/ J. Blaine Anderson  
J. BLAINE ANDERSON  
Judge, United States District Court

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. CIV 1-76-3

[Received Jan. 15, 1976]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

JOHN T. DUNLOP, Secretary of Labor of the United States of America, in his official capacity; JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health, in his official capacity; JAMES W. LAKE, Assistant Regional Director, Occupational Safety and Health Administration, in his official capacity; and RICHARD C. JACKSON, Area Director, Occupational Safety and Health Administration, in his official capacity, DEFENDANTS

AFFIDAVIT IN SUPPORT OF PRELIMINARY INJUNCTION

STATE OF IDAHO       )  
                              ) ss.  
COUNTY OF ADA       )

FERROL G. "BILL" BARLOW, being first duly sworn on oath, deposes and says:

1. I am the president and active manager of Barlow's, Inc., an Idaho corporation in good standing, whose principal place of business is located at 225 West Pine Street, Pocatello, Idaho 83201.

2. Barlow's, Inc., has been in the business of installing electrical wiring and fixtures, plumbing and fixtures, and

heating and air conditioning equipment for approximately seventeen years. The amount of our business in each area is divided approximately equally.

3. Barlow's, Inc., deals almost exclusively with customers in the vicinity of Pocatello, Idaho. The sheet metal which the corporation uses in fabricating heating and air conditioning ductwork is produced without the State of Idaho.

4. Barlow's, Inc., is licensed by the State of Idaho with regard to its business in the field of electrical and plumbing installations and by the City of Pocatello as a business conducted within that city. Barlow's, Inc., is not licensed by the United States or any agency thereof, and it is not regulated in any way by the United States or any agency thereof other than in common with all other enterprises engaged in interstate commerce.

5. On September 11, 1975, at approximately 11:00 a.m., one T. Daniel Sanger approached me as I was standing at the customer service counter at Barlow's, Inc.'s, place of business. Mr. Sanger identified himself as a Compliance Officer for the Occupational Safety and Health Administration. After conducting an initial interview with me he stated that he was now ready to conduct a general inspection of the non-public portion of the plant which is completely closed off by partitions from the public and customer service area which is open to the public. I inquired as to whether he had a search warrant and denied him the right to make an inspection of the non-public area of the premises upon learning that he did not have such a warrant. He asked why we refused to allow the inspection, and I stated that the Fourth Amendment required that a warrant be obtained. After concluding a collect telephone call and stating that we would see each other again, he left.

6. I am not aware of any complaints by any of the employees of Barlow's, Inc., concerning the safety of the equipment used by Barlow's, Inc., nor do I believe the firm to be in violation of any safety and health standards. When I inquired of Mr. Sanger as to the reason for the inspection, he stated that there were no complaints, and the name of the firm had simply come up at

this time. While I do not recall the exact words of the conversation, it is my impression that Mr. Sanger proposed to make a simple, routine inspection.

7. On or about December 17, 1975, I was served with the Order to Show Cause filed in the United States District Court for the District of Idaho in Civil case no. CIV 4 75 58. On December 30, 1975, the Honorable Fred M. Taylor, Judge of the United States District Court, entered an order in the above mentioned case which required our firm to allow inspection of the corporation's business premises in accordance with the provisions of the Occupational Safety and Health Act of 1970. On January 5, 1976, the above mentioned T. Daniel Sanger once more appeared upon our business premises, served me with the above mentioned order, and demanded that he be allowed to make his general inspection in accordance with the terms of the order. At that time I respectfully declined to allow such inspection upon the grounds of the rights guaranteed by the Fourth Amendment.

DATED: This 8 day of January, 1976.

---

FERROL G. "BILL" BARLOW

SUBSCRIBED AND SWORN TO before this 8 day of January, 1976.

---

Notary Public for Idaho  
Residing at Boise, Idaho

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(three-judge court)

[Filed Mar. 19, 1976]

BARLOW'S, INC., an Idaho Corporation, PLAINTIFF

v.

W. J. USERY, Secretary of Labor of the United States  
of America, in his official capacity, et al., DEFENDANTS

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION, OR, IN THE ALTERNATIVE, FOR  
SUMMARY JUDGMENT

Defendants, the Secretary of Labor et al., move the Court to dismiss the complaint since the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) provides exclusive forums in which to raise objections to

OSHA inspections and this court is accordingly without subject matter jurisdiction to rule on such objections which form the sole basis for petitioner's complaint. Alternatively, since the prior order of this Court granting the Secretary's petition for entry, inspection and investigation, and rejecting identical constitutional objections, was a final decision on the merits from which petitioner never appealed, the complaint should be dismissed under the doctrine of *res judicata* because it seeks to relitigate the same issues. Fed. R. Civ. P. 12(b)(6). Finally, if the complaint is properly before the Court, summary judgment should be granted the Secretary since the facts are undisputed and the Act's inspection procedures are constitutional. F.R. Civ. P. 56(b).

WHEREFORE, defendants respectfully request the instant complaint be dismissed, or, in the alternative, that summary judgment be granted in their favor.

Respectfully submitted,

MARION J. CALLISTER  
United States Attorney

By

---

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MARCH 1976

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge-Court)

[Received Apr. 15, 1976]

BARLOW', INC., an Idaho corporation, PLAINTIFF

—vs—

W. J. USERY, Secretary of Labor of the United States of  
 America, in his official capacity, et al., DEFENDANTS

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by its attorneys and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this court to enter summary judgment for the Plaintiff on the ground that there is no genuine issue as to any material fact and the Plaintiff is entitled to judgment as a matter of law.

In support of this motion, Plaintiff refers to the record herein including the Complaint; the Affidavits of Mr. Ferrol G. "Bill" Barlow and Mr. T. Daniel Sanger; Plaintiff's Memorandum of Points & Authorities in Opposition to Defendants' Motions for Dismissal and in Support of Plaintiff's Motion for Summary Judgment; and oral argument.

DATED: April 14, 1976.

RUNFT & LONGETEIG CHARTERED

By \_\_\_\_\_  
 JOHN L. RUNFT, of the firm

By \_\_\_\_\_  
 DAVID J. STECHER, of the Firm  
 Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the within and foregoing PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, together with MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR DISMISSAL AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, was made this 14th day of April, 1976, by mailing a copy thereof to Mr. Marion J. Callister, United States Attorney, Federal Building, 550 West Fort Street, Boise, Idaho 83724.

\_\_\_\_\_  
 DAVID J. STECHER

WILBUR T. NELSON  
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UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

[Filed Jan. 4, 1977]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF,

vs.

W. J. USERY, Secretary of Labor of the United States  
 of America, in his official capacity, et al., DEFENDANTS.

MOTION TO SUSPEND AND STAY  
 ENFORCEMENT OF INJUNCTION

COME NOW the Defendants by and through the United States Attorney for the District of Idaho and hereby move the Court, pursuant to Rule 62 of the Federal Rules of Civil Procedure, to suspend and stay enforcement of the injunction against the Defendants granted in the Court's Memorandum Decision and Order and Summary Judgment entered on December 30, 1976, in the above-captioned case, pending disposition of this matter on appeal to the United States Supreme Court upon the grounds and for the reasons that:

1. By said Memorandum Decision and Order and Summary Judgment received by the Defendants on January 3, 1977, the Court expressly held Section 8(a) of the Occupational Safety and Health Act, 29 U.S.C. 657(a), unconstitutional, and enjoined the Defendants from acting or attempting to act pursuant to or in furtherance of that section.

2. On January 4, 1977, the Defendants pursuant to 28 U.S.C. 1252 and 1253 filed a Notice of Appeal directly to the United States Supreme Court from the Court's Memorandum Decision and Order and Summary Judgment entered on December 30, 1976.

3. Disposition of the appeal by the Supreme Court will at minimum take several months. If during that time this Court does not suspend and stay its Memorandum Decision and Order and Summary Judgment, there is no question that the Defendants and the public and affected employees will be irreparably damaged. The inspection and investigation provision struck down by the Court is at the heart of the Act. For it is only "upon inspection or investigation" that the Secretary may issue citations requiring employer abatement of violations of duly-promulgated standards or the general duty clause requiring that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 658(a), 654(a). Thus, to the extent Section 8(a) has been made inoperable by the Judgment and Order of this Court the Secretary is almost totally powerless to require employers to remedy hazardous conditions which endanger the safety and health of employees. Considering the vast scale of the act such paralysis of inspections and the enforcement scheme they trigger will have devastating effects on the employees for whose benefit the Act was passed.

4. One other District Court has flatly rejected the constitutional attack accepted here, while two other three-judge courts considering the same issue have refused to strike down Section 8(a). Instead they have simply interpreted the statute to preclude warrantless non-consensual inspections by the Secretary, a result whose effect on the government's ability to enforce is less severe. Accordingly, there is a strong possibility that even if the Supreme Court ultimately disagrees with the Secretary's position, it will not take the road taken here but will construe the statute consistent with the Fourth Amendment. Thus, there is strong ground for believing the Secretary

will suffer irreparable injury if the Court's Judgment and Order are not stayed, even in the event he loses his appeal.

5. Finally, the Court has effectively enjoined enforcement of a major federal regulatory statute as repugnant to the Constitution. To state that result is itself to justify a stay, the purpose of which has traditionally been to preserve the *status quo* pending final disposition, not irretrievably reverse it so far as workers injured in the interim are concerned. See, e.g., *St. Pierre v. U.S.*, 319 U.S. 41, 42-43 (1943). When the purpose of the statutory three-judge court procedure—to prevent such injury to governmental interests by providing an expedited route for final resolutions as swiftly as possible, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154-155 (1963)—is considered in addition, a stay *pendente lite* is even more forcefully warranted. An opposite result would treat this Court's Order as final to the detriment of innumerable employees, despite the issues imminent resolution by the Supreme Court.

WHEREFORE, Defendants move this Court to stay its Memorandum Decision and Order and Summary Judgment entered on December 30, 1976, pending disposition of the direct appeal to the United States Supreme Court.

Respectfully submitted.

WILBER T. NELSON  
United States Attorney

By /s/ Paul L. Westberg  
PAUL L. WESTBERG  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

[Received & Filed Jan. 10, 1977]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF,

vs.

W. J. USERY, Secretary of Labor of the United States of America, in his official capacity, et al., DEFENDANTS.

ORDER DENYING MOTION FOR STAY

The defendants' motion for stay pending appeal pursuant to Rule 62(c), Fed. Rules of Civil Proc., and plaintiff's opposition thereto have been received and considered by the three judges assigned to hear the cause in this court. No hearing is deemed necessary since all judges concur. The defendants' showing as to irreparable harm and other essential elements usually invoked to justify the granting of a stay or suspension of enforcement are conclusory and insufficient. The decision of this court does not strike down or dismantle the whole statutory scheme. Only one section of the Act is affected. Accordingly,

IT IS ORDERED HEREBY that the motion to stay and suspend the operation and enforcement of the judgment and decree of December 30, 1976, is DENIED.

DATED this 10th day of January, 1977.

/s/ M. Oliver Koelsch  
M. OLIVER KOELSCH  
Senior Circuit Judge

/s/ J. Blaine Anderson  
J. BLAINE ANDERSON  
Circuit Judge

/s/ Ray McNichols  
RAY MCNICHOLS  
Chief District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

[Received & Filed Jan. 27, 1977]

BARLOW'S, INC., an Idaho corporation, PLAINTIFF,

vs.

W. J. USERY, Secretary of Labor of the United States  
of America, in his official capacity, et al., DEFENDANTS.

ORDER CORRECTING MEMORANDUM DECISION

It has been brought to the attention of the court in this cause that an error appears on page 2 under Part I of the Memorandum Decision and Order filed herein on December 30, 1976, and that the interests of clarity and accuracy require a correction. Accordingly,

IT IS ORDERED HEREBY that the word "Administration" appearing in the fourth line from the bottom of page 2 of the typewritten Memorandum Decision and Order of December 30, 1976, is deleted and in lieu thereof the following is inserted, "Review Commission (29 U.S.C. § 661," so that the passage shall read (lines 4 and 5 from bottom) "—the Occupational Safety and Health Review Commission (29 U.S.C. § 661), and, second, that plaintiff. . .".

DATED this 25th day of January, 1977.

FOR THE COURT:

/s/ J. Blaine Anderson  
J. BLAINE ANDERSON

United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. A-600

ALFRED G. ALBERT, ACTING SECRETARY OF LABOR, ET AL.,  
APPELLANTS

v.

BARLOW'S, INC.

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ORDER

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UPON CONSIDERATION of the application of the Acting Solicitor General for a stay of the judgment of the United States District Court for the District of Idaho in this case,

IT IS ORDERED that the judgment of that court entered December 30, 1976, be, and the same is hereby, stayed insofar as it purports to restrain the conduct of applicant outside the District of Idaho, pending receipt of a response from respondent and further order of the Circuit Justice or of the Court.

/s/ William H. Rehnquist  
Associate Justice of the  
Supreme Court of the  
United States

Dated this 25 day of January, 1977

## SUPREME COURT OF THE UNITED STATES

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 No. A-600
 

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RAY MARSHALL, SECRETARY OF LABOR, APPLICANT

v.

BARLOW'S, INC.

ON APPLICATION FOR STAY

[February 3, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

The Solicitor General, on behalf of the Secretary of Labor, applies for a partial stay of an injunction issued by a three-judge District Court in the District of Idaho. That court held that § 8(a) of the Occupational Health and Safety Act, 29 U. S. C. § 657(a), allowing warrantless entry and inspection of work places for OSHA violations, is in conflict with the Fourth Amendment of the United States Constitution, and enjoined further searches by the Secretary's representative pursuant to that section. The Government does not seek a stay of the order insofar as it protects the respondent from future searches, but only as it protects persons not party to this suit. On January 25, 1977, I granted a stay of the order to the extent that the order restrains the applicant's conduct outside of the District of Idaho.

Upon consideration of the response subsequently filed, I now grant in full the Government's request for a stay of the three-judge court order as it affects persons other than the respondent. On the merits of the Fourth Amendment question, the District Court relied on our decisions in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. Seattle*, 387 U.S. 541 (1967). The Government relies on our decisions in *Colonnade Catering Corp. v.*

*United States*, 397 U. S. 72 (1970) and *United States v. Biswell*, 406 U. S. 311 (1972) to urge a contrary result. The proposed stay will not affect the respondent in any way, and there are no equities weighing against it which may be asserted by persons actually before the Court. In such a situation, where the decision of the District Court has invalidated a part of an Act of Congress. I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court.

The Government's application for a stay is accordingly granted pending the timely filing of a notice of appeal and jurisdictional statement, and the disposition of the same by this Court.

## SUPREME COURT OF THE UNITED STATES

No. A-600

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
APPELLANTS

v.

BARLOW'S, INC.

---

ORDER

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UPON FURTHER CONSIDERATION of the application of the Acting Solicitor General of the United States and together with the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the District of Idaho entered December 30, 1976 in case Civil No. 1-76-3 be, and the same is hereby, stayed, except as it applies to appellee Barlow's, Inc., pending the timely docketing of an appeal in the above-entitled case. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, or the judgment of the United States District Court is summarily vacated, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ William H. Rehnquist  
Associate Justice of the  
Supreme Court of the  
United States

Dated this 3rd day of February, 1977.

A true copy MICHAEL RODAK, JR.  
Test:Clerk of the Supreme Court of the  
United States

By /s/ Francis J. Lorson

SUPREME COURT OF THE UNITED STATES

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
APPELLANTS

v.

BARLOW'S, INC.

APPEAL from the United States District Court for the  
District of Idaho.

The statement of jurisdiction in this case having been  
submitted and considered by the Court, probable jurisdic-  
tion is noted.

April 18, 1977

JUN 2 1977

IN THE

## Supreme Court of the United States, CLERK

October Term, 1976

76-1148

RAY MARSHALL, Secretary of Labor, et al.,

*Appellants,*

VS.

BARLOW'S, INC.,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

BRIEF AMICI CURIAE ON BEHALF OF  
ELEVEN STATES URGING REVERSAL

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IN THE  
**Supreme Court of the United States**

October Term, 1976

RAY MARSHALL, Secretary of Labor, et al.,  
*Appellants,*

vs.

BARLOW'S, INC.,  
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

BRIEF AMICI CURIAE ON BEHALF OF  
ELEVEN STATES URGING REVERSAL

**QUESTION PRESENTED**

Whether the inspection provisions of section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), which authorize representatives of the Secretary of Labor to conduct limited inspections of commercial premises at reasonable times without a warrant, are consistent with the Fourth Amendment.

## INTEREST OF AMICI CURIAE

Pursuant to specific congressional encouragement<sup>1</sup> twenty-three states<sup>2</sup> and the Virgin Islands have state development plans on file with the Secretary of Labor which entitle these states and the Virgin Islands to supplant federal enforcement of the Occupational Safety and Health Act after the completion of several development steps. Thus, enforcement of the Occupational Safety and Health Act within these states is now predominately accomplished by the respective state officials.

If the decision in *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977) (three-judge court), is allowed to stand, the efforts of these states to protect their workers against occupational hazards will be severely impaired since the states would no longer be able to make the unannounced reasonable warrantless inspections of commercial establishments which Congress determined were critical to a proper enforcement of the Occupational Safety and Health Act.<sup>3</sup>

<sup>1</sup> The enabling legislation reads in relevant part as follows:

(b) Any state which at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b).

<sup>2</sup> The twenty-three states are Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

<sup>3</sup> See H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. 27 (1970).

## ARGUMENT

By enacting the Occupational Safety and Health Act, (hereinafter "the Act"), 29 U.S.C. § 651 *et seq.*, Congress was attempting to meet the national crisis of occupational hazards involving safety and health in the workplace. Section 8(a)<sup>4</sup> of the Act provides to the Secretary of Labor and his authorized representatives a limited right to enter commercial premises without a warrant to conduct inspections. This circumscribed right of warrantless entry is unquestionably a reasonable search for purposes of the Fourth Amendment and is fully consistent with relevant decisions of this Court. By ruling section 8(a) to be violative of the Fourth Amendment, the district court herein, *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977), misconstrued decisions of this Court concerning warrantless administrative inspections and other types of warrantless inspections and declined to consider several directly relevant district court decisions. Furthermore, the right to privacy embodied in the Fourth Amendment was never intended to be used as a device to deny workers their right to work in a safe environment.

<sup>4</sup> Section 8(a) reads as follows:

(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

# I. CONGRESS FOUND THE OCCUPATIONAL HAZARDS EXISTING IN THE WORKPLACE TO BE A NATIONAL CRISIS.

In considering the Act, Congress faced the stark fact that over 14,500 American workers die each year as a result of their jobs and that approximately 2.2 million more workers are disabled on the job.<sup>5</sup> Congress further found that "this grim current scene . . . represents a worsening trend, for the fact is that the number of disabling injuries per million man hours worked is today 20% higher than in 1958."<sup>6</sup>

This Court, in the recent case of *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm.*, 97 S. Ct. 1261, 1263 (1977) discussed this congressional history and observed that "[a]fter extensive investigation, Congress concluded, in 1970, that work-related deaths and injuries had become a 'drastic' national problem." Quoting the Senate Report, the Court further observed that

The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today . . . . In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses.

<sup>5</sup> S. Rep. No. 91-1282, 91st Cong., 2d Sess. 2 (1970).

<sup>6</sup> *Id.*

*Id.* at 1263 n. 1. See also *National Realty and Construction Co., Inc. v. Occupational Safety and Health Review Comm.*, 489 F.2d 1257, 1260-61 (D.C. Cir. 1973).

The congressional history reflects a public interest in the demonstrable problem of health and safety in the workplace that is at least as substantial as the interest in liquor control recognized by this court in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) and the interest in firearms control recognized by this court in *United States v. Biswell*, 406 U.S. 311 (1972). As one district court, which upheld a provision in the Food, Drug, and Cosmetic Act, 21 U.S.C. § 374 allowing warrantless inspections of warehouses containing food products, observed:

It would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries.<sup>7</sup>

# II. SECTION 8(a) IS CONSISTENT WITH THE ADMINISTRATIVE INSPECTION CASES OF THIS COURT.

The Fourth Amendment does not ban all warrantless searches but only those which are unreasonable. See *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). In defining what is a reasonable search, a strong presumption of validity attaches to a congressional determination of reasonableness. *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Di Re*, 332 U.S. 581 (1948). Furthermore, "[i]n delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual. . . ." *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>7</sup> *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143 (D. Okla. 1973).

In the most recent pronouncement on administrative inspections, *United States v. Biswell*, 406 U.S. 311 (1972), this Court upheld a warrantless search of the commercial premises of a licensed firearms dealer against contentions that the search violated the Fourth Amendment. At issue in this case was a provision of the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, which authorized warrantless inspections by Federal Treasury agents of firearms or ammunition dealers. Pursuant to this authority, the respondent Biswell's premises were inspected by federal agents and, based on evidence found during this inspection, Biswell was convicted of a firearms violation. In upholding the conviction, this Court held that:

In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

*Id.* at 315. In elaborating on its rationale for this holding, the *Biswell* Court focused on two critical points which have precise parallels in the instant case.

First, this Court noted that "close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." *Id.* at 315. Thus, it is clear that the *Biswell* Court, in weighing the public interest, was concerned with the demonstrable problems in firearms trafficking and the necessity of meeting the problem with an effective law. Similarly, the scope of the problems in occupational safety and health have been noted *supra* and are as relevant to this Court's determination herein as they were in *Biswell*.

Second, in *Biswell*, this Court emphasized the critical importance of unannounced inspections by stating:

It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. . . . Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

*Id.* at 316.

Similarly, it is clear that unannounced inspections are critical to the efficacy of the Act in the case at bar. Congress recognized that many occupational hazards are transitory or easily concealed<sup>8</sup> and that unannounced inspections were necessary, since "advance notice to an employer has been a prime cause of the breakdown in . . . enforcement" under other safety statutes.<sup>9</sup> Furthermore, the constant possibility of inspections is essential to secure the broad voluntary compliance on which the effectuation of the Act depends.<sup>10</sup>

<sup>8</sup> Examples of the transitory nature of many occupational hazards are outlined in considerable detail in the Secretary's Jurisdictional Statement in the instant case at 10 n. 12.

<sup>9</sup> H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 27 (1970). The Act makes it a criminal offense to give advance notice of an inspection. 29 U.S.C. § 666(f). Furthermore, this Court has noted that "surprise may often be a crucial aspect of routine inspections of business establishments. . . ." See *v. City of Seattle*, 387 U.S. 541, 545 n. 6 (1967).

<sup>10</sup> See *Usery v. Godfrey Brake & Supply Serv., Inc.*, 545 F. 2d 52, 55 (8th Cir. 1976); *Dunlap v. Rockwell International*, 540 F.2d 1283, 1292 (6th Cir. 1976).

Any contention that the *Biswell* principles apply only to historically regulated industries must fail for the Court, in referring to *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970),<sup>11</sup> explicitly observed that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry [in *Colonnade*]." 406 U.S. at 315. Nevertheless, the Court in *Biswell* proceeded to validate the warrantless search of a firearms dealer.<sup>12</sup>

Furthermore, there is nothing in *Camara v. Municipal Court*, 387 U.S. 523 (1967) or *See v. City of Seattle*, 387 U.S. 541 (1967) which would militate against this Court applying the *Biswell* rationale to the instant case. *Camara* involved a warrantless administrative search of an occupied part of an apartment house. The housing codes were enforced by criminal processes and it was a criminal violation for an occupant to deny admittance to housing inspectors. The Court ruled that under such circumstances and where the occupant had "no way of knowing the lawful limits of the inspector's power to search," *Camara v. Municipal Court*, *supra*, 387 U.S. at 532, such warrantless searches contravened the Fourth Amend-

<sup>11</sup> In *Colonnade*, this Court held that the Secretary of the Treasury had authority under congressional enactments to enter the premises of retail liquor dealers and conduct inspections without a warrant.

<sup>12</sup> In any event, the safety of the workplace and health of the workers was pervasively regulated prior to the Act. As the Senate Report stated:

There is a long-established statutory precedent in both Federal and State law to require employers to provide a safe and healthful place of employment. Over 36 states have provisions of this type, and at least three Federal laws contain similar clauses, . . .

S. Rep. No. 91-1282, 91st Cong., 2d Sess. 150 (1970), 1970 U.S. Code Cong. & Admin. News, 5177, 5186. See also, 29 U.S.C. § 653(b)(2); *Associated Industries of New York State v. United States*, 487 F.2d 342, 351-53 (2d Cir. 1973).

ment. Similar issues were presented in *See* except that the administrative search therein involved commercial premises.

The rationales of *Camara* and *See* are inapplicable to the instant case for several reasons. First, both *Camara* and *See* involved criminal prosecutions. The *Camara* court repeatedly noted this factor, 387 U.S. at 531-33, and emphasized that "only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search." 387 U.S. at 532. Similarly, a criminal statute was involved in *See v. City of Seattle* and that case adopted the principles enunciated in *Camara*. 387 U.S. at 542.

Section 8(a), however, is a civil law and imposes virtually no threat of criminal liability.<sup>13</sup> Furthermore, there are no sanctions whatsoever for refusals to allow inspections and, upon a refusal, the Department of Labor must commence civil enforcement proceedings. 29 C.F.R. §1903.4.

Second, *Camara* only held that "unreasonable" administrative inspections of private dwellings were prohibited by the Fourth Amendment. One of the specific rationales articulated for ruling the search therein to be unreasonable was that the occupant of a dwelling had

no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

*Camara v. Municipal Court*, 387 U.S. at 532.

Under section 8(a), however, the parameters of the warrantless inspection are carefully circumscribed. Section 8(a)

<sup>13</sup> Section 17(e) authorizes criminal sanctions only where there are willful violations causing employee death. 29 U.S.C. § 666(e).

provides that a representative of the Secretary of Labor may enter a place of employment "without delay and at reasonable times . . . to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, . . . ." 29 U.S.C. 657(a). The inspection must be limited to the scope necessary to identify occupational hazards. *Id.* When an inspector presents himself at a place of employment, he must show the employer appropriate credentials,<sup>14</sup> and if the employer is unconvinced, he may call the OSHA Area Director for verification. See *Usery v. Godfrey Brake & Supply Service, Inc.*, 545 F.2d 52, 55 (8th Cir. 1976). The inspector must explain the nature, purpose and scope of the inspection, 29 C.F.R. § 1903.7(a), and the employer may accompany the inspector during his inspection, 29 U.S.C. § 657(e). Furthermore, the inspection must not unreasonably disrupt normal business operations, 29 C.F.R. § 1903.7(d), and at the conclusion of the inspection, the inspector must informally advise the employer of any apparent safety or health violations. 29 C.F.R. § 1903.7(e).

Thus, section 8(a) substantially ameliorates the problems the *Camara* court expressed with the broad scope of the search involved in that case. Furthermore, although the *See* Court recognized that the businessman was free from "unreasonable official entries" the Court differentiated the standard of reasonableness to be applied for commercial premises vis-a-vis private homes:

<sup>14</sup> These credentials "state the inspector's name, identify him as a compliance officer for the Department of Labor and paraphrase the statutory authority for his entry. The officer's photo and signature appear on the credentials." *Usery v. Godfrey Brake & Supply Service, Inc.*, 545 F.2d 52, 54 (8th Cir. 1976).

We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes. . . ."

387 U.S. at 545. See *G.M. Leasing Corp. v. United States*, 97 S. Ct. 619, 629 (1977); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204-05 (1946); *Youghiogeny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 50-51 (E.D. Ohio 1973).<sup>15</sup>

Finally, in *Camara*, the Court noted that "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." *Camara v. Municipal Court*, *supra*, 387 U.S. at 533.

In the instant case, however, Congress indicated its intent that entry be made "without delay" within the limits of section 8(a) and specifically observed that advance notice to employers had impeded the effective implementation of other safety statutes.<sup>16</sup> A warrant requirement would significantly impair the effectiveness of authorized inspections since, as this Court has noted, "surprise may often be a crucial aspect of routine inspections of business establishments." See *v. City of Seattle*, *supra*, 387 U.S. at 545, n. 6. See *Brennan v. Buckeye*

<sup>15</sup> In *Youghiogeny*, a case involving the power of the Secretary of the Interior to make warrantless searches of coal mines, the court emphasized the quasi-public nature of the mines by observing that:

the plaintiff's mines are open to representatives of the public and the public has every right to ensure that the working conditions of these same mines meet certain safety standards. It might be said that the plaintiff waives any rights to privacy it may otherwise have in these facilities by operating a business which requires the daily labor of large numbers of miners who have understandably been characterized by Congress as the 'most precious resource of the coal industry.'

364 F. Supp. at 50-51.

<sup>16</sup> See H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. 27 (1970).

*Industries, Inc.*, 374 F. Supp. 1350, 1354 (S.D. Ga. 1974). In addition, the Act covers several million workplaces and the Secretary of Labor has only about 1,300 inspectors. A requirement of routine pre-inspection warrants would unduly hamper the effective administration of the Act by placing a significant burden on these limited resources thus impairing the effectuation of the Act's purpose of swift abatement of occupational hazards.

Furthermore, since the Act's purposes are best effectuated by random unannounced spot inspections, the factors identified in *Camara* as supporting a finding of probable cause<sup>17</sup> would not normally exist for an inspection pursuant to section 8(a). In most instances, until the inspection has taken place, there is no way of knowing whether possible violations of the Act exist which threaten a worker's safety. As this Court observed in *United States v. Biswell*, *supra*, 406 U.S. at 316, "if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."

In summary, the rationale delineated by this Court in *Biswell* for validating limited warrantless administrative searches of commercial premises should be applied to the case herein. There are no significant distinguishing factors between the provision of the Gun Control Act upheld in *Biswell* and section 8(a) of the Act. Furthermore, such a determination would not be inconsistent with *Camara* and *See* and, indeed, would comport with the underlying principle of *See* that a reasonable inspection of a business establishment may be conducted without a warrant.

<sup>17</sup> The factors outlined in *Camara* included "passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area. . . ." *Camara v. Municipal Court*, *supra*, 387 U.S. at 538.

### III. THE DISTRICT COURT'S RELIANCE ON ALMEIDA-SANCHEZ AND WESTERN ALFALFA IS MISPLACED.

In addition to its reliance on *Camara* and *See*, the district court determined that this Court's decisions in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) and *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), mandated an invalidation of section 8(a). However, *Almeida-Sanchez* involved a substantially different fact situation and, in any event, the rationale of that decision has been undermined by this Court's more recent decision in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The *Western Alfalfa* case is, to the extent relevant, supportive of the Secretary's position.

In *Almeida-Sanchez*, this Court ruled that a warrantless search of an accused's private automobile made without probable cause or consent by a roving patrol of the United States Border Patrol about 25 miles north of the Mexican border was not a border search and was not justified by the Immigration and Nationality Act.<sup>18</sup> and violated the Fourth Amendment's warrant requirement. Although the district court herein did not elaborate on its rationale for relying on *Almeida-Sanchez*, it is apparent that the search in *Almeida-Sanchez* was of a virtually unlimited and standardless nature. It was fraught with possibilities of abuse, invasions of privacy and unbridled discretion of the Border Patrol and bears no resemblance to section 8(a) of the Act.

<sup>18</sup> The Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3) allowed such warrantless searches "within a reasonable distance from any external boundary of the United States."

In the more recent case of *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which the district court did not cite, this Court upheld routine stops and checks at a fixed point 66 miles north of the Mexican border. In language particularly significant to the instant case, this court stated that:

In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual. . . .

Furthermore, the Court emphasized varying degrees of expectations of privacy and emphasized that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." Similarly, a businessman's privacy expectations are necessarily less than in one's residence since by its "special nature and voluntary existence [a business] may open itself to intrusions that would not be permissible in a purely private context." *G.M. Leasing Corp. v. United States*, 97 S. Ct. 619, 629 (1977). See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 204 (1946). *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 50-51 (E. D. Ohio 1973). It was never intended that the Fourth Amendment cast a veil of protective secrecy over commercial ventures which might subject their employees to potentially hazardous working conditions.

The district court herein also relied on this Court's recent determination in *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) and viewed it as a specific reaffirmation of *Camara* and *See*. Such reliance by the district court was totally misplaced. *Western Alfalfa* applied the "open fields" exception of the Fourth Amendment to the situation

where an inspector for the petitioner entered the outdoor premises of a commercial establishment without the knowledge or consent of the respondent to observe smoke plumes emitted from chimneys. Indeed, if any conclusion is to be drawn from this case, it would seemingly suggest a further narrowing of the Fourth Amendment warrant requirement vis-a-vis inspections of commercial establishments in line with *Colonnade and Biswell*.<sup>19</sup>

In summary, *Almedia-Sanchez* and *Western Alfalfa Corp.* lend no support to appellants' position and the recent case of *Martinez-Fuerte* emphasizes the flexible approach this Court has taken relative to Fourth Amendment warrant issues depending on circumstances other than private homes.

<sup>19</sup> Furthermore, the District Court did not discuss *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 137 (D. Del. 1972), a case much closer to the facts in the case at bar than a border search case. The federal court there upheld a warrantless, non-consensual inspection of a bakery by Food and Drug Administration inspectors. The warrantless inspection was authorized by 21 U.S.C. § 374(a) and the court noted that it was carefully limited.

## CONCLUSION

The efficacy of the enforcement efforts of the Secretary of Labor and of the various states which administer their own OSHA program would be severely impaired if any type of a warrant requirement were mandated by this Court. Unannounced, random inspections are crucial to obtaining the broad voluntary compliance which is required for a proper effectuation of the Act. Section 8(a) is a reasonable approach to confronting the national crisis in occupational health and safety existing in this country.

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
APPELLANTS

v.

BARLOW's, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
APPELLANTS

v.

BARLOW'S, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge district court (J.S.  
App. A) is reported at 424 F. Supp. 437.

JURISDICTION

The judgment of the district court declaring Sec-  
tion 8(a) of the Occupational Safety and Health Act  
of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), unconstitu-  
tional and enjoining the Secretary from acting pur-  
suant to that Section was entered on December 30,  
1976 (J.S. App. B). A notice of appeal to this

Court (J.S. App. C) was filed on January 4, 1977, and the appeal was docketed on February 17, 1977. The Court noted probable jurisdiction on April 18, 1977.

The jurisdiction of this Court is conferred by 28 U.S.C. 1252, which authorizes a direct appeal to this Court from a final judgment of any court of the United States holding an Act of Congress unconstitutional in any civil action to which the United States is a party. See *Fleming v. Rhodes*, 331 U.S. 100, 102-103; *United States v. Christian Echoes Ministry*, 404 U.S. 561, 563; *McLucas v. DeChamplain*, 421 U.S. 21, 23. The jurisdiction of this Court also rests upon 28 U.S.C. 1253, which authorizes an appeal to this Court from an injunctive order of a three-judge district court when such order rests upon the merits of a constitutional claim. See *MTM, Inc. v. Baxley*, 420 U.S. 799, 804.<sup>1</sup>

#### QUESTIONS PRESENTED

1. Whether the inspection provisions of the Occupational Safety and Health Act, 29 U.S.C. 657(a), and their implementing regulations, violate the Fourth Amendment guarantee against unreasonable searches and seizures, insofar as they authorize representatives of the Secretary of Labor "during regular working hours and at other reasonable times, and within rea-

<sup>1</sup> Because the action was commenced on January 6, 1976, the three-judge district court had jurisdiction to consider appellee's constitutional claims. See Section 7 of Pub. L. 94-381, 90 Stat. 1119, 1120.

sonable limits and in a reasonable manner" to conduct warrantless inspections of the portions of commercial premises routinely occupied by an employer's work force.

2. Whether, if a warrant is required, the district court should have upheld the constitutionality of the statute by interpreting it to meet the requirements of the Fourth Amendment, instead of holding the statute unconstitutional and enjoining its enforcement.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), provides:

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable

manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

#### STATEMENT

##### A. THE STATUTE

The Occupational Safety and Health Act of 1970 (OSHA), 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651; *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, No. 75-746, decided March 23, 1977, slip op. 1-3; *National Realty and Construction Co., Inc. v. Occupational Safety and Health Review Commission*, 489 F.2d 1257, 1260-1261 (C.A.D.C.).<sup>2</sup> To this end, the Act

<sup>2</sup> The need for the Act is explained in S. Rep. No. 91-1282, 91st Cong., 2d Sess. 2-4 (1970); Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. ("Leg. Hist.") 142-144 (1971):

"The problem of assuring safe and healthful workplaces . . . ranks in importance with any that engages the national attention today.

" . . . 14,500 persons are killed annually as a result of industrial accidents; . . . during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes.

" . . . [And] the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and

creates a federal statutory duty to avoid maintaining unsafe or unhealthy working conditions applicable to any non-governmental employer whose business affects commerce. 29 U.S.C. 654(a)(1) and (2), 652(5).

The Act is enforced by the Secretary of Labor through a self-contained administrative mechanism

the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses.

" . . . Substantial numbers [of workers], even today, fall victim to ancient industrial poisons such as lead and mercury. . . . Other materials long in industrial use are only now being discovered to have toxic effects. In addition, technological advances . . . have brought numerous new hazards to the workplace. Carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, pesticides . . . all present incipient threats . . .

"In 1966-67 the Surgeon General . . . found that 65 percent of [142,000 sampled workers] were potentially exposed to harmful physical agents . . . or to toxic materials . . . and found that only 25 percent . . . were adequately [protected by existing controls].

" . . . As many as 3.5 million workers are exposed to some extent to [deadly] asbestos fibers . . .

"In sum, the chemical and physical hazards which characterize modern industry are not the problem of . . . a single industry, nor a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern."

The House Report (H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 14 (1970), Leg. Hist. 844) describes occupational health and safety as "the most crucial [issue] in the whole environmental question," and notes that "[t]he on-the-job health and safety crisis is the worst problem confronting [over 80 million] American workers."

which provides for speedy, expert and uniform resolution of contested cases by an independent Review Commission, subject to the usual appellate review. 29 U.S.C. 651(2), (3) and (10), 658-661, 666(i). See generally, *National Realty and Construction Co. Inc. v. Occupational Safety and Health Review Commission*, *supra*, 489 F.2d at 1261-1264; *Brennan v. Winters Battery Mfg. Co.*, 531 F. 2d 317 (C.A. 6), certiorari denied *sub nom. Winters Battery Mfg. Co. v. Usery*, 425 U.S. 991; *Brennan v. Occupational Safety and Health Review Commission (Gordon Co.)*, 492 F. 2d 1027, 1030 (C.A. 2).

The Secretary's inspectors are authorized by the Act to conduct safety and health inspections at places of employment. 29 U.S.C. 657(a). If, upon inspection, the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, fixing a reasonable time for its abatement, and (in his discretion) proposing a civil monetary penalty. 29 U.S.C. 658, 659.<sup>3</sup> If the employer does not contest the citation within

<sup>3</sup> The amount of the proposed penalty "if any" (29 U.S.C. 659(a)) depends on the severity of the hazard and the cited employer's past diligence in attempting to discover and correct it (*ibid.*; see 29 U.S.C. 666(i) and (j)). The prospect of such penalties is designed to promote voluntary compliance by employers before any inspector arrives. 29 U.S.C. 651(1); see Leg. Hist. 463-464, 470 (Sen. Javits), 471-472 (Sen. Dominick), 853; *Brennan v. Occupational Safety and Health Review Commission (Interstate Glass Co.)* 487 F.2d 438, 441, 443 (C.A. 8). Cf. *National Independent Coal Operators' Association v. Kleppe*, 423 U.S. 388, 401. Such

15 working days, it becomes a final abatement order and is "not subject to review by any court or agency." 29 U.S.C. 659(a). Cases in which violations are contested are tried before Occupational Safety and Health Review Commission administrative law judges, subject to review by the Commission and the courts of appeals. 29 U.S.C. 659(c), 660, 661(i).

The inspections must be made "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner \* \* \*." 29 U.S.C. 657(a)(2). Selection of the workplaces to be inspected is made by departmental area directors, and not by the inspectors.<sup>4</sup> Upon pres-

proposed penalties may range up to \$1,000 for serious violations, and to a maximum of \$10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666(a)-(c) and (j). See, e.g., *Intercounty Construction Co. v. Occupational Safety and Health Review Commission*, 522 F. 2d 777 (C.A. 4), certiorari denied, 423 U.S. 1072; *Messina Construction Corp. v. Occupational Safety and Health Review Commission*, 505 F. 2d 701 (C.A. 1).

The Secretary may also propose a civil penalty of not more than \$1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final agency order, 29 U.S.C. 659(b), 666(d), and may seek temporary injunctions in federal district court to correct imminent dangers before administrative enforcement would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter to the Department of Justice for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a \$10,000 fine. 29 U.S.C. 666(e). However, since the Act's April 1971 effective date, approximately 400,000 inspections have resulted in only 5 criminal prosecutions.

<sup>4</sup> See U.S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, chapter 4, 1 CCH Employment Safety and Health Guide ¶ 4327.2 (1976).

entation of his credentials to the employer or agent in charge of the premises,<sup>8</sup> the inspector is entitled to entry "without delay" to inspect for occupational safety and health hazards "where work is performed by an employee of an employer." 29 U.S.C. 657(a). Advance notice of the inspection is prohibited and is subject to criminal sanctions. 29 U.S.C. 666(f), 651(10). The employer is entitled to accompany the inspector during his tour of the relevant premises, and may raise privacy or other objections to the conduct of the inspection. 29 U.S.C. 657(e); see 29 C.F.R. 1903.4, 1903.7(e), 1903.8.<sup>9</sup>

The statute provides no sanctions for refusals to permit inspections (but see p. 34, note 12, *infra*). In implementing the statute, the Secretary has promulgated a regulation requiring the inspector to seek compulsory process authorizing entry if the employer refuses to consent to the inspection (29 C.F.R. 1903.4).

<sup>8</sup> These credentials bear a photograph of the inspector and identify him by name and area office. The credentials also paraphrase and cite the statutory authority to inspect. See *Usery v. Godfrey Brake and Supply Service, Inc.*, 545 F.2d 52, 53-55 (C.A. 8). Inspectors may offer toll-free verifying calls to their area offices if these credentials do not convince employers of the propriety of the inspection (*ibid.*). Agency regulations also require that the inspector explain the nature, purpose and scope of the proposed inspection, avoid unreasonable disruption of business operations or hazardous conduct, and obey the employer's normal work rules. 29 C.F.R. 1903.7(a), (c), and (d).

<sup>9</sup> Trade secrets of the employer are explicitly protected. 29 U.S.C. 664-665; 29 C.F.R. 1903.9.

#### B. THE FACTS OF THIS CASE AND THE PROCEEDINGS BELOW

Appellee Barlow's, Inc. operates an electrical, plumbing, and heating and air-conditioning installation business in Pocatello, Idaho. At 11:00 a.m. on September 11, 1975, an OSHA inspector arrived at Barlow's to make a routine inspection of its work areas,<sup>7</sup> presented his credentials, and explained his mission to Ferrol G. "Bill" Barlow, the company's president, who denied entry to the inspector because he did not have a search warrant (A. 16-17). After notice and hearing, the Secretary obtained a district court order on December 30, 1975, which authorized the entry for inspection purposes (J.S. App. A 1a-2a).

On January 5, 1976, the inspector returned to Barlow's and requested permission to inspect based on the district court's order. Permission was again denied, and the next day appellee filed a complaint in the United States District Court for the District of Idaho, alleging that 29 U.S.C. 657(a) is inconsistent with the

<sup>7</sup> The inspection was a "general schedule" investigation—it was not based on any employee complaint (29 U.S.C. 657(f)), history of past violations (29 U.S.C. 659(b), 666(d)), or other reason to believe a violation was occurring at that particular location (J.S. App. A 2a). Such general inspections, now called Regional Programmed Inspections, are carried out in accordance with criteria based upon accident experience and the number of employees exposed in particular industries. U.S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, *supra*, 1 CCH Employment Safety and Health Guide ¶ 4327.2 (1976).

Fourth Amendment and seeking temporary and permanent injunctions against OSHA inspections. On January 15, 1976, a single judge denied Barlow's requests for preliminary relief (J.S. App. A 3a).

A three-judge court was thereafter convened (J.S. App. 3a). Relying on *Camara v. Municipal Court*, 387 U.S. 523, and *See v. City of Seattle*, 387 U.S. 541, the district court held that the inspection provisions of 29 U.S.C. 657(a), which authorize warrantless inspections of the business establishments covered by the Act, "are unconstitutional as being violative of the Fourth Amendment" (J.S. App. A 10a). The district court rejected the applicability of this Court's subsequent decisions in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, and *United States v. Biswell*, 406 U.S. 311, on the ground that those cases respectively "dealt with an 'industry long subject to close supervision and inspection' (*Colonnade*, 397 U.S. at 77), and a pervasively regulated business (*Biswell*, 406 U.S. at 316)" (J.S. App. A 7a). In so ruling, the court followed the decision of another three-judge district court in *Brennan v. Gibson's Products Inc. of Plano*, 407 F. Supp. 154 (E.D. Tex.), appeal pending, C.A. 5, No. 76-1526 (J.S. App. A 7a-9a).

However, unlike the court in *Gibson's Products*, the court below concluded that Section 8(a) of OSHA could not be construed to require "that a warrant be obtained before any inspection is undertaken" (J.S. App. A 10a). In this respect, the court stated that

"Congress was able \* \* \* to employ language declaring that a warrant must first be obtained \* \* \* [but] did not do so and we refuse to accept that duty" (J.S. App. A 10a). The court therefore held OSHA to be unconstitutional and permanently enjoined the Secretary from conducting safety inspections pursuant to 29 U.S.C. 657(a), and specifically from inspecting appellee's premises (*ibid.*).

On February 3, 1977, Mr. Justice Rehnquist stayed the district court's order except as it applied to appellee Barlow's (A. 38-41) on the ground that "the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court" (A. 39).

#### SUMMARY OF ARGUMENT

##### I.

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, arose out of a congressional finding that "the common law and other existing remedies for work injuries resulting from unsafe working conditions \* \* \* [were] inadequate to protect the Nation's working men and women." *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, No. 75-746, decided March 23, 1977, slip op. 18. At issue in this case is the constitutionality of the inspection provisions which are at the heart of the enforcement of the safety and health standards established under the Act. In order to insure compliance, Congress has authorized representatives of the Secre-

tary of Labor, "upon presenting appropriate credentials" "to enter without delay and at reasonable times any factory \* \* \* [etc.] \* \* \* to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions" (29 U.S.C. 657(a)).

The language of the inspection provisions and the pertinent legislative history establish that Congress intended to grant the Secretary broad power to enter whatever business establishments he might choose to inspect and that the inspections were to be carried out expeditiously with no advance notice. Thus, the statute authorizes the Secretary to "enter without delay \* \* \* any factory [etc.]" (29 U.S.C. 657(a)) (emphasis supplied) without any necessity to show cause to suspect that a violation might exist. Since an employer often can easily conceal hazardous working conditions, Congress provided criminal sanctions against giving advance notice of any inspection. In Congress' view, the power to conduct prompt, unannounced inspections would promote compliance with the Act despite the Secretary's limited personnel resources because employers would be motivated to maintain safe and healthful working conditions against the everpresent possibility of an inspection.

2. The decision of the three-judge district court that the Secretary cannot conduct an inspection without a search warrant frustrates the clearly articulated intent of Congress and has no valid foundation in the Fourth Amendment decisions of this Court. "The de-

cisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498. Thus, whether a search or an inspection without a warrant is constitutionally unreasonable depends upon a determination whether the privacy interest at stake is of such magnitude and the authorized entry so significant an encroachment on that interest that the interposition of a neutral and detached magistrate should be required in the absence of exigent circumstances to approve the search or the inspection.

Here, there is no significant privacy interest at stake that calls for the imposition of the warrant requirement. The areas and equipment within appellee's workplace that the Secretary seeks to inspect are routinely occupied and used by appellee's employees. This critical fact serves to diminish appellee's claims of privacy with respect to the work areas of his business premises, especially *vis-a-vis* the inspectors who are charged with the responsibility of insuring the health and safety of the employees whom appellee has assigned to such areas. Indeed, the Secretary's specifically focused inspection of an employer's workplace during "regular working hours" when the employees are present (and would be free to report violations of the Act) can hardly be said to intrude upon the employer's right of privacy in the same degree as would a search of his home, office, or person. Thus, in important respects, in the case of an inspection

under the Occupational Safety and Health Act, the invasion of privacy "if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865.

3. This Court's decisions in *Camara v. Municipal Court*, 387 U.S. 523, and *See v. City of Seattle*, 387 U.S. 541, do not control this case. The privacy interests in *Camara* and *See* that resulted in the imposition of a warrant requirement for local housing and fire code inspections were both of a considerably greater magnitude than appellee's claim of privacy in this case. *Camara* involved a personal residence, necessarily implicating a core privacy interest. And while *See* involved a commercial warehouse, "[t]he warehouse \* \* \* [was] maintained as locked premises and \* \* \* [was] inaccessible to anyone except the defendant" (408 P. 2d at 263). Although *See* held Fourth Amendment protections applicable to commercial premises, that decision did not preclude the use of warrantless searches of such premises "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope \* \* \* [pursuant to] the authority of a valid statute." *United States v. Biswell*, 406 U.S. 311, 315.

Three considerations that were significant to the Court's decisions in *Camara* and *See* are absent in this case. First, the Occupational Safety and Health Act does not provide any sanction for simple refusal to consent to an inspection. Second, a magistrate would provide no meaningful safeguard in the present

context for an employer's privacy interests because the highly detailed provisions of the Act limit the inspector's discretion to examination of the work areas in order to determine the existence of occupational hazards. There are accordingly no questions of fact or discretion with respect to which the antecedent evaluation of a magistrate would be required or even helpful to safeguard the privacy interests that are the touchstone of the Fourth Amendment.

Finally, unlike the situation in *Camara* and *See*, a warrant requirement would significantly impede the effectuation of the purpose of the Occupational Safety and Health Act. This would be the case whether the warrant need be sought only after access is refused or prior to any attempt to inspect. If an employer could refuse to permit an inspection without a warrant, his refusal would provide him with the functional equivalent of advance notice and he could often temporarily conceal occupational hazards. Moreover, requiring the Secretary to obtain a warrant in advance of each inspection would impede enforcement of the Act by imposing needless additional strain on the Secretary's limited resources to cover nearly five million workplaces with only 1,300 inspectors.

4. This case is governed by this Court's analysis in *United States v. Biswell*, *supra*. In upholding warrantless inspections as part of a comprehensive federal gun control program, the decision in *Biswell* reflects the Court's recognition that the gun inspection powers at issue were necessary to implement a

regulatory system in which important societal interests were at stake. 406 U.S. at 315-316. Congress has similarly determined that the health and safety of the Nation's workers is of great public importance and that unannounced inspections are essential to the enforceability of the statute. Here, as in *Biswell*, "the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible" (406 U.S. at 316). Where, as here, the areas to be inspected are comprehensively regulated, inspectors "kn[o]w with certainty" that those areas contain regulated working conditions and are "within the proper scope of official scrutiny" (*Almeida-Sanchez v. United States*, 413 U.S. 266, 271), and employers are "not left to wonder about the purposes of the inspector or the limits of his task" (*United States v. Biswell*, *supra*, 406 U.S. at 316), no warrant is required.

## II.

Even if the Court should conclude that the Fourth Amendment precludes warrantless safety inspections of comprehensively regulated working areas, the district court erred in declaring 29 U.S.C. 657(a) "unconstitutional and void" (J.S. App. B 11a) and enjoining its enforcement. It should instead have followed this Court's rule that "under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consist-

ent with the Fourth Amendment," *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 272, and interpreted the statute to meet Fourth Amendment requirements.

## ARGUMENT

### I. THE SECRETARY'S WARRANTLESS INSPECTION DURING REGULAR BUSINESS HOURS OF THE PORTIONS OF COMMERCIAL PREMISES ROUTINELY OCCUPIED BY AN EMPLOYER'S WORK FORCE, PURSUANT TO HIS AUTHORITY UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT, DOES NOT VIOLATE THE FOURTH AMENDMENT

This case presents the second constitutional challenge in this Court to a major federal statute designed to guarantee safe and healthful working conditions to the Nation's workers in businesses affecting interstate commerce. Last Term in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, No. 75-746, decided March 23, 1977, the Court unanimously held that the Seventh Amendment did not prohibit Congress from creating a new cause of action in the government for civil penalties for violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, and assigning the adjudication of such violations to an administrative agency where there is no jury trial. As the Court stated, "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation nor prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field" (slip op. 12).

In so holding, the Court recognized that the genesis of the Act was the congressional finding that "the common law and other existing remedies for work injuries resulting from unsafe working conditions \* \* \* [were] inadequate to protect the Nation's working men and women" (slip op. 18). See 29 U.S.C. 651. The Act therefore authorizes the Secretary of Labor "to set mandatory occupational safety and health standards" (29 U.S.C. 651(3), 655) and creates a new statutory duty for employers to furnish employment and a place of employment that are "free from recognized hazards" and to "comply with occupational safety and health standards promulgated" by the Secretary (29 U.S.C. 654(a)(1) and (2)).

The issue here is the constitutionality of the inspection provisions which are at the heart of the enforcement of the safety and health standards established under the Act. In order to insure compliance with the statutory standards, Congress authorized representatives of the Secretary of Labor to conduct reasonable safety and health inspections. Pursuant to 29 U.S.C. 657(a), the OSHA inspectors, upon presentation of their identifying credentials, are empowered to enter places of employment "without delay and at reasonable times" for the purpose of inspecting "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner" such places and all pertinent conditions. If a violation is discovered, the Secretary issues a citation to the employer fixing a reasonable

time for its abatement and, in his discretion, proposing a civil monetary penalty. See 29 U.S.C. 658, 659.

There is no statutory requirement that the Secretary's representatives obtain a search warrant in order to inspect an employer's workplace. The question presented is whether the warrantless inspections authorized by the statute are compatible with the Fourth Amendment's guarantee against "unreasonable searches and seizures." It is our submission that the safeguards contained in the Act for the conduct of such inspections are sufficient to meet Fourth Amendment requirements in light of the limited nature of an employer's privacy interest in the portions of his premises routinely occupied by his employees. As we shall show, that interest is not sufficient to override a specific congressional authorization, made to further comprehensive regulation of employees' working conditions, where the possibilities of abuse and the threat to privacy are not of impressive dimensions.

*A. The Act authorizes "reasonable" warrantless inspections in order to effectuate the congressional purpose of preventing an employer from concealing safety and health hazards*

1. The language of the Act establishes beyond question that Congress intended to grant the Secretary broad power to enter whatever covered business establishments he might choose to inspect and that the inspections be carried out expeditiously with no ad-

vance notice. The inspection provision authorizes the Secretary to "enter without delay \* \* \* any factory \* \* \*" (29 U.S.C. 657(a); emphasis supplied) without any necessity to show cause to suspect that a violation might exist.<sup>8</sup> Furthermore, the Act's provisions show that, in view of the ease with which hazardous working conditions might be temporarily concealed or ameliorated, Congress regarded surprise as a critical element of the Secretary's authority under the Act to conduct routine spot inspections. The statutory preamble specifically recognizes that, as an important aspect of "an effective enforcement program," the Act contains "a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition" (29 U.S.C. 651(10)).<sup>9</sup>

<sup>8</sup> See also 29 U.S.C. 667(c)(3), which specifies that state plans submitted to the Secretary establish "a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in \* \* \* [29 U.S.C. 657(a)]."

The Act also provides a procedure for an employee to file a complaint with the Secretary alleging a violation within his place of employment. If the Secretary concludes that there are reasonable grounds to believe that the alleged violation exists, "he shall make a special inspection \* \* \* as soon as practicable, to determine if such violation or danger exists" (29 U.S.C. 657(f)). See also 29 C.F.R. 1903.11.

<sup>9</sup> The criminal penalty for giving such advance notice of an inspection is a fine of \$1,000, a maximum prison term of six months, or both (29 U.S.C. 666(f)).

There are four exceptions to the prohibition against giving advance notice of inspection: (1) in cases of apparent imminent danger, to enable the employer to abate the danger as quickly as

The congressional directive that inspections be conducted without delay and the prohibition against giving advance notice of an inspection are designed to prevent an employer from concealing violations from the inspector's scrutiny. As the Eighth Circuit stated in *Usery v. Godfrey Brake and Supply Service, supra*, 545 F. 2d at 55: "[P]rompt, unannounced inspections are an important element in enforcement of this Act. \* \* \* Undoubtedly the provision for entry 'without delay,' like the advance notice provision, prevents subversion of the program and encourages consistent compliance."

The statutory language is reinforced by the pertinent legislative history. The Senate Committee on Labor and Public Welfare Report (S. Rep. No. 91-1282, 91st Cong., 2d Sess. 11 (1970)) stated that "[i]n order to carry out an effective national occupational safety and health program it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment." Accord: H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 22 (1970). Moreover, during the House floor debates, Representative Steiger, the co-sponsor of the Act, explained: "In general, it is our intent \* \* \*

possible; (2) where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection; (3) where necessary to assure the presence of representatives of the employer and employees needed to aid in the inspection; and (4) where the Area Director determines that advance notice would enhance the probability of an effective and thorough inspection. See 29 C.F.R. 1903.6.

that the Federal inspector should gain entry to a business or workplace with an absolute minimum of delay." The inspector was not to be compelled "to wait an inordinate amount of time" or to "give up and go back to his office." Leg. Hist. 1076. Finally, the House Committee on Education and Labor emphasized the crucial element of surprise in the execution of the inspections, stating that (H.R. Rep. No. 91-1291, *supra*, at 26-27) "[e]ssential to the effective enforcement of this Act is the premise that employers will not be forewarned of inspections of their plants. Experience under the Walsh-Healey Act has indicated that the practice of advance notice to an employer has been a prime cause of the breakdown in that statute's enforcement provisions."

2. The decision of the district court that an OSHA inspection cannot be conducted without a search warrant would thus frustrate the clearly articulated intent of Congress to provide for flexible representative inspections "without delay" of the working conditions of the Nation's employees. Nothing in the language of the Act or in its legislative history in any way suggests that the Secretary's inspectors are required to obtain a search warrant as a prerequisite to gaining entry to the portion of a regulated business establishment occupied by the employer's work force.<sup>10</sup>

<sup>10</sup> Every bill that was introduced in either house granted inspection powers to the Secretary that were cast in terms similar to those set forth in Section 8(a) of the Act. See, e.g., S. 2193, 91st Cong., 1st Sess., Sec. 5(a) (1969), Leg. Hist. 10-11 (Williams bill); S. 2788, 91st Cong., 1st Sess., Sec. 6(a) (1969), Leg. Hist. 46 (Javits bill); S. 4404, 91st Cong., 2d Sess., Sec. 9(a) (1970),

Indeed, the district court acknowledged as much in stating that "[c]ertainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations" (J.S. App. A 10a).

Moreover, there can be no doubt that the OSHA inspector who sought entry into appellee's business premises fully complied with the statutory standards governing inspections and the Secretary's regulations promulgated thereunder. He arrived at appellee's place of business at 11 a.m.—"during regular working hours" (29 U.S.C. 657(a)(2))—and presented his credentials which identified him as a representative of the Secretary (29 U.S.C. 657(a)). He then requested permission from appellee's president to enter the company's worksite, and advised him of the pertinent statutory authority for such inspection (29 C.F.R. 1903.7(a), (c), and (d)). Thus, the sole basis for appellee's denial of permission to enter by the OSHA inspector was that the inspector "did not possess a Warrant and that it was \* \* \* [appellee's] right as a citizen to due process and that a Warrant was necessary before he would permit \* \* \* [the inspector] to make the inspection" (A. 17). We submit that the district court's acceptance of appellee's constitutional claim reflects a serious misapprehension of the Fourth Amendment jurisprudence of this Court.

Leg. Hist. 92 (Dominick bill); H.R. 3809, 91st Cong., 1st Sess., Sec. 5(a) (1969), Leg. Hist. 638-639 (O'Hara bill); H.R. 13373, 91st Cong., 1st Sess., Sec. 6(a) (1969), Leg. Hist. 694 (Ayres bill).

*B. The fundamental policy of protection of privacy interests embodied in the Fourth Amendment would not be meaningfully advanced by adoption of a warrant requirement for the Secretary's routine inspection of work areas of commercial premises under the Occupational Safety and Health Act*

The Fourth Amendment imposes two separate, although related, limitations upon searches and seizures. The first clause of the Amendment "is general and forbids every search that is unreasonable." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357. The second clause places a number of restrictions upon the issuance and character of warrants. Although the Amendment itself does not indicate the interrelation between the two clauses, the Court has stated on a number of occasions that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529. See also *Cady v. Dombrowski*, 413 U.S. 433, 439; *United States v. United States District Court*, 407 U.S. 297, 314-321; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455; *Katz v. United States*, 389 U.S. 347, 357. It was on this statement in *Camara* that the district court relied in holding that warrantless OSHA inspections by representatives of the Secretary are barred by the Fourth Amendment (see J.S. App. A 5a-6a).

Contrary to the district court's conclusion, this case is not controlled by *Camara v. Municipal Court*, 387 U.S. 523, and *See v. City of Seattle*, 387 U.S. 541.

While the Court applied a warrant requirement in those cases in the context of administrative inspections, their rationale does not extend to the federal regulatory statute at issue here. As we shall show, this case is governed by the analysis in the Court's subsequent decisions in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, and *United States v. Biswell*, 406 U.S. 311, which explained the basis of its prior rulings in *Camara* and *See* and upheld the constitutionality of properly limited warrantless inspections under closely similar federal regulatory statutes.

1. "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski*, *supra*, 413 U.S. at 439. See also *South Dakota v. Opperman*, 428 U.S. 364, 372-373. Whether a search or seizure is reasonable within the meaning of the Fourth Amendment depends "upon the facts and circumstances of each case" (*Cooper v. California*, 386 U.S. 58, 59) and "the context in which [the Fourth Amendment right] is asserted" (*Terry v. Ohio*, 392 U.S. 1, 9). And, as the Court explained in *Warden v. Hayden*, 387 U.S. 294, 305-306, the primary object of the Fourth Amendment is the protection of privacy rather than proprietary rights. "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498. See also *Schmerber v. California*, 384 U.S. 757,

769-770; *Katz v. United States*, 389 U.S. 347, 350; *United States v. Dionisio*, 410 U.S. 1, 14-15. But not all governmental intrusions are of equal magnitude or demand the identical degree of protection. Rather, each such intrusion must be tested by its justification and by the significance of the privacy interests involved. *South Dakota v. Opperman*, *supra*, 428 U.S. at 377-378 (Powell, J., concurring).

Thus, whether a search or an inspection without a warrant is *per se* unreasonable (in the absence of exigent circumstances) depends upon a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to authorize the search or the inspection. As the Court has stated, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, *supra*, 387 U.S. at 536-537.

Accordingly, while the Court has held that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of [a man's] home" (*McDonald v. United States*, 335 U.S. 451, 455-456), it has sustained the validity of warrantless searches or seizures in other contexts where core privacy interests are not similarly implicated. For example, the Court has expressly declined to impose a warrant requirement on otherwise reasonable searches of automobiles. See, *e.g.*, *Carroll v.*

*United States*, 267 U.S. 132, 149; *Chambers v. Maroney*, 399 U.S. 42, 49; *Cardwell v. Lewis*, 417 U.S. 583, 589-591. The Court has recognized that its disparate treatment of automobiles and personal residences no longer rests narrowly upon the fact that vehicles are mobile and dwellings are not. *Cady v. Dombrowski*, *supra*, 413 U.S. at 441-442. Rather, the distinction proceeds from the premise that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell v. Lewis*, *supra*, 417 U.S. at 590. See also *United States v. Martinez-Fuerte*, 428 U.S. 543, 565; *United States v. Ortiz*, 422 U.S. 891, 896 n. 2; *South Dakota v. Opperman*, *supra*, 428 U.S. at 367. Cf. *United States v. Chadwick*, No. 75-1721, decided June 21, 1977.

As in the cases involving automobile searches, the limited statutory inspection program at issue here does not implicate significant privacy interests calling for the imposition of the warrant requirement. We do not mean to suggest that a commercial building is the functional equivalent of an automobile for purposes of the Fourth Amendment or that the rationale of the automobile search cases is freely transferable to searches of other types of property. Indeed, the Court has included commercial premises such as a private office within the protections of the warrant requirement. See *G.M. Leasing Corp. v. United States*, No. 75-235, decided January 12, 1977, slip op. 14, 19;

*Mancusi v. DeForte*, 392 U.S. 364. But under the criterion of privacy that is the touchstone of the Court's Fourth Amendment decisions, not all areas within a commercial building are entitled to the same degree of constitutional protection. For example, no one would suggest that law enforcement officers would need a warrant to enter during business hours the public areas of a store that are open to customers. For, as this Court has observed, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, *supra*, 389 U.S. at 351; *United States v. Dionisio*, *supra*, 410 U.S. at 14. See also *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 78 (Burger, C.J., dissenting).

Conversely, the contents of drawers, cabinets and the like, whether they are in a private residence or in a commercial building, are generally protected against warrantless inspection by the State. Moreover, the Court has applied the warrant requirement to a search of a double-locked footlocker seized upon the arrest of the owner in a public place. The Court there viewed the owner's placing of his personal effects in such a receptacle as manifesting an expectation that the contents would remain free from public examination. *United States v. Chadwick*, *supra*, slip op. 9.

However, as was the case with the warrantless searches of the exterior of an automobile and of the glove compartment of an impounded vehicle that the Court respectively upheld in *Cardwell v. Lewis*, *supra*, and *South Dakota v. Opperman*, *supra*, there are

areas of a commercial building in which the owner does not have a significant expectation of privacy from reasonable, limited-purpose inspections during business hours. When such a limited privacy interest is at stake and when the conduct of law enforcement officers does not touch upon interests that implicate "the essential purpose of the Fourth Amendment" (*Jones v. United States*, *supra*, 357 U.S. at 498), there is no necessity to invoke the most stringent protections of the Amendment. *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 564-565. While the work areas of a conventional factory housing a legitimate business enterprise may be closed to the general public (cf. *Air Pollution Variance Board v. Western Alfalfa Corp.*, *supra*, 416 U.S. at 865), their routine occupation by the owner's employees and the frequent visits by those outside parties who deliver materials for the conduct of the enterprise effectively diminish any claim of privacy by the factory owner with respect to such areas—especially *vis-a-vis* inspectors whose mission is to insure the health and safety of the very employees whom the owner has assigned for his profit to the areas at issue. Cf. *Clarkson Construction Co. v. Occupational Safety and Health Review Commission*, 531 F.2d 451, 458 (C.A. 10).

Simply put, the Act guarantees to these employees that they will be able to perform their labor in a safe and healthful environment, and the employer cannot assert his ownership interest in the premises to bar the way of the inspector assigned to assure the observance of that guaranty. As the Court stated

more than 30 years ago in rejecting an analogous "property right" claim in *Marsh v. Alabama*, 326 U.S. 501, 506. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Cf. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 798, 802 n. 8; *Central Hardware Co. v. National Labor Relations Board*, 407 U.S. 539, 547; *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563; *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 521-523.

The foregoing analysis supports the reasonableness of the warrantless inspections of commercial premises authorized by the Occupational Safety and Health Act of 1970. Pursuant to the statute, the Secretary of Labor is empowered to inspect "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, and materials therein" (29 U.S.C. 657(a)(2)). Thus, the Act prescribes a regulatory inspection system that is limited in time, place and scope. Since an employer's work force routinely occupies the areas and uses the equipment that the Secretary is authorized to inspect, and since the employees (who are the Act's intended beneficiaries) may freely observe and report any violation,<sup>11</sup> the Secretary's inspection of those areas and

<sup>11</sup> Cf. *United States v. Miller*, 425 U.S. 435, 442 (holding that a depositor lacks a Fourth Amendment interest in bank records con-

items during "regular working hours" when the employees are present can hardly be said to intrude upon the employer's right of privacy in the same degree as would a search of his home, office or person. Indeed, one court of appeals has characterized the violations that an OSHA officer discovered during a routine inspection—"ungrounded machines, lack of color coating on the fire extinguishers, etc.—\* \* \* [as] in plain, obvious view." *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F. 2d 84, 88 (C.A. 5). As that court further stated, "There was no search here of drawers or other sequestered areas. For that reason \* \* \* [the employer] may not rely on the *Camera/See* precedent" (*ibid.*). Cf. *Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Review Commission*, 519 F. 2d 1257, 1263 (C.A. 3). Accord: *Youghioghny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 51 (S.D. Ohio) (three-judge court) (Coal Mine Health and Safety Act of 1969). Thus, in important respects, in a routing OSHA inspection of an employer's workplace, the invasion of privacy "if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board v. Western Alfalfa Corp.*, *supra*, 416 U.S. at 865.

taining "information voluntarily conveyed [by him] to the banks and exposed to their employees in the ordinary course of business"). See also *Couch v. United States*, 409 U.S. 322, 335. And see, e.g., *United States v. Matlock*, 415 U.S. 164, 170 ("the consent of one who possesses common authority over premises or effects is valid as against the absent nonconsenting person with whom that authority is shared").

2. The district court erred, we submit, in concluding that this Court's prior decisions involving administrative inspections require invalidation of warrantless inspections under the Occupational Safety and Health Act of 1970. In *Camara v. Municipal Court*, 387 U.S. 523, the Court held that the Fourth Amendment barred criminal prosecution of one who refused to permit a warrantless housing code inspection of his personal residence. The companion decision in *See v. City of Seattle*, 387 U.S. 541, extended this rule to a similar fire code inspection of a locked commercial warehouse not used as a residence.

To begin with, the privacy interests asserted in *Camara* and *See* that resulted in the imposition of a warrant requirement were both of a considerably higher magnitude than appellee's claim of privacy in this case. *Camara* involved a personal residence, necessarily implicating a core privacy interest. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 564-656. Cf. *United States v. Chadwick*, *supra*. And while *See* involved a commercial warehouse, "[t]he warehouse \* \* \* [was] maintained as locked premises and \* \* \* [was] inaccessible to anyone except the defendant" (408 P. 2d at 263). Although *See* held Fourth Amendment protections applicable to commercial premises, that decision did not preclude the use of warrantless searches of such premises "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope \* \* \* [pursuant to] the authority of a valid statute." *United States v. Biswell*, *supra*, 406 U.S. at

315. Here, the OSHA inspector sought to examine during business hours only that portion of appellee's business premises that was routinely occupied by its employees in the course of the performance of their duties, for purposes of a statutorily authorized inspection that was also "carefully limited in \* \* \* scope."

The Court's opinions in *Camara* and *See* indicate that three considerations were important to its determinations that warrants were constitutionally required in those inspection contexts. First, that "refusal to permit an inspection \* \* \* [was] itself a crime, punishable by fine or even by jail sentence" and that "only by refusing entry and risking a criminal conviction can the occupant \* \* \* challenge the inspector's decision to search" (387 U.S. at 531, 532). Second, the Court found that the warrant process would provide meaningful safeguards for the occupant by requiring the official to justify the need for the inspection and show that it was within the lawful limits of his authority. As the Court stated in *See*, the warrant process would insure that "the decision to enter \* \* \* will not be the product of the unreviewed discretion of the enforcement officer in the field" (387 U.S. at 545; footnote omitted). Finally, the Court observed in *Camara* that "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement" (387 U.S. at 533). Without such a showing, the Court rejected the city's argument that the public interest justified warrantless housing code searches.

These three considerations upon which *Camara* and *See* turned are absent in this case involving warrantless inspections under a detailed federal regulatory statute. As we have pointed out *supra*, p. 8, the Occupational Safety and Health Act of 1970 does not provide any sanction for simple refusal to consent to an inspection.<sup>12</sup> Pursuant to 29 C.F.R. 1903.4, the Secretary "shall promptly take appropriate action, including compulsory process, if necessary" authorizing entry if the inspector is initially refused entry. Thus, under the Secretary's regulations, the inspection system established by the Act contemplates neither physical force nor criminal proceedings against a recalcitrant employer but provides for the initiation of legal process to compel compliance.<sup>13</sup>

Moreover, unlike the situation in *Camara* and *See*, a requirement of search warrants for the Secretary's routine "general schedule" OSHA inspections would provide no meaningful safeguard for an employer's

<sup>12</sup> However, Section 17(h) of OSHA amended 18 U.S.C. 1114 to include OSHA inspectors within its protection. And 18 U.S.C. 111 subjects to criminal liability one who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in [18 U.S.C. 1114] while engaged in or on account of the performance of his official duties \* \* \*." See *United States v. Camp*, 541 F. 2d 737, 739 (C.A. 8).

<sup>13</sup> The Court has subsequently indicated that the existence of criminal penalties for refusal to permit entry to a federal liquor inspector does not demand the conclusion that a warrant is required. See *Colonnade Catering Corp. v. United States*, 397 U.S. 72, which we discuss at pp. 42-43, *infra*.

privacy interests in addition to those provided by the Act and regulations themselves. In *Camara*, the Court observed that "when the inspector demands entry, the occupant has no way of knowing \* \* \* the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization" (387 U.S. at 532). In the Court's view, "[t]hese are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area" (*ibid.*).

But there is no comparable function for a magistrate to perform in an OSHA inspection. Pursuant to the Act, the Secretary is authorized only "to inspect \* \* \* any \* \* \* place of employment and all pertinent conditions, structures \* \* \* therein \* \* \*" for unsafe working conditions. The statute further confines the scope of the Secretary's inspection power to "regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner \* \* \*" (29 U.S.C. 657 (a)(2)) and directs the inspector to present "appropriate credentials to the owner, operator, or agent in charge" (29 U.S.C. 657(a)) prior to his entry on the premises. Finally, the regulations direct the inspector to explain the nature and purpose of his visit (29 C.F.R. 1903.7).

In these circumstances, the employer cannot claim that he has "no way of knowing whether enforcement of \* \* \* [the Act] requires inspection of his premises"

(387 U.S. at 532).<sup>14</sup> Moreover, since the essence of the general schedule inspection is that it is a random spot check, the factors identified in *Camara v. Municipal Court*, *supra*, 387 U.S. at 538-539, as supporting a finding of probable cause for inspection would be largely irrelevant.<sup>15</sup> Likewise, the Act limits the inspector's

<sup>14</sup> The Act requires an employer to be familiar with its detailed application to this workplace. See 29 U.S.C. 654(a), 657(e), 666(j); 29 C.F.R. 1903.7(e), Part 1904; *Ames Crane & Rental Service v. Dunlop*, 532 F. 2d 123 (C.A. 8); *Brennan v. Butler Lime & Cement Co.*, 520 F. 2d 1011, 1016-1018 (C.A. 7); *Accu-Namics, Inc. v. Occupational Safety and Health Review Commission*, 515 F. 2d 828, 835 (C.A. 5), certiorari denied, 425 U.S. 903. See, generally, *National Realty and Construction Co., Inc. v. Occupational Safety and Health Review Commission*, *supra*, 489 F. 2d at 1265-2167 nn. 34-38.

<sup>15</sup> For example, we are advised by the Department of Labor that a new plant or process is frequently more hazardous than an established industrial activity. Moreover, the "passage of time" (387 U.S. at 538) since the last inspection is not a useful criterion, especially where only a minute percentage of the Nation's workplaces has ever been inspected. See p. 40, and note 21, *infra*. Since the Secretary is directed to conduct general schedule inspections in order to establish enforcement of the Act on a representative basis, there would be no factual questions for a magistrate to resolve. Cf. S. Rep. No. 91-1282, *supra*, at 12; Leg. Hist. 152.

Probable cause for inspections based on fatality reports or employee complaints could be established by submitting to the magistrate the fatality report prepared by the employer (29 C.F.R. 1904.8) or the employee complaint, which must in any event be presented to the employer at the time of the inspection (29 U.S.C. 657(f)(1)). But the warrant procedure in these cases would provide the employer with no more information concerning the reasonableness of the inspection than he is already provided by statute and regulation. See *United States ex rel. Terraciano v. Montanye*, 493 F. 2d 682, 685 (C.A. 2), Certiorari denied *sub nom. Terraciano v. Smith*, 419 U.S. 875. Moreover, we are advised by the Department of Labor that the data derived from its information retrieval system show that random general schedule inspections result in a higher percentage of discovered violations than those triggered by complaints or fatality reports.

discretion to search to the scope necessary to identify occupational hazards and the inspector's presentation of "appropriate credentials" serves to confirm that he is acting under proper authorization.<sup>16</sup> Thus, the procedures established by the Act answer the critical questions of scope and authority identified by the Court in *Camara* as requiring determination by a magistrate.<sup>17</sup> See *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 565. There are accordingly no questions of fact or discretion in an OSHA inspection with respect to which the antecedent evaluation of a magistrate would be required or even helpful to safeguard the privacy interests that are the touchstone of the Fourth Amendment. See *South Dakota v. Opperman*, *supra*, 428 U.S. at 382-383 (Powell, J., concurring). Cf. *United States v. Chadwick*, *supra*, slip op. 7-8; *G.M. Leasing Corp. v. United States*, *supra*, slip op. 18.

Finally, unlike the situations in *Camara* and *See*, a warrant requirement would significantly impede the enforcement of the Occupational Safety and Health Act. This would be the case whether the warrant need

<sup>16</sup> If the employer questions the authority of the inspector, he may confirm the inspector's identify and authorization by means of a toll-free call. See p. 8, note 5, *supra*. Thus, there is no substantial threat of "criminal entry under the guise of official sanction" (*Camara v. Municipal Court*, *supra*, 387 U.S. at 531).

<sup>17</sup> Moreover, the scheduling of OSHA inspections is not a matter left to "the discretion of the enforcement officer in the field." See, *supra*, 387 U.S. at 545. Inspections are scheduled by the Secretary's Assistant Regional Directors and Area Directors pursuant to policy guidance set forth in Chapter IV of the Secretary's *Field Operations Manual* for the administration of the Act. See ICCH Employment Safety and Health Guide ¶ 4327.2 (1976) and p. 9, n. 7, *supra*.

be sought only after access is refused, as in *Camara*, or prior to any attempt to inspect. As this Court noted in *See v. City of Seattle, supra*, 387 U.S. at 545 n. 6, "surprise may often be a crucial aspect of routine inspections of business establishments."<sup>18</sup> Here, by prohibiting advance notice of inspections, Congress recognized that any significant delay once the inspector arrived would seriously lessen the effectiveness of the inspection system.<sup>19</sup>

<sup>18</sup> Because of the potential importance of the element of surprise, the Court in *See* left open the question whether warrants to inspect business premises may be issued only after access is refused. With respect to business premises, the Court stated that "the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes" (387 U.S. at 545 n. 6).

<sup>19</sup> Representative Steiger, the co-sponsor of the Act, recently described the problems that would ensue if a warrant requirement were imposed on OSHA inspections. He stated (123 Cong. Rec. H163 to H164 (daily ed., January 6, 1977)): "••• [I]t is of course true that any order restricting OSHA's ability to inspect harms safety and health enforcement, since the right to make unannounced inspections is the cornerstone of the act."

"••• [W]arrantless civil inspections are both absolutely essential to this act's enforcement and a longstanding Federal practice."

"••• And the fact remains that any requirement which would permit employers to turn inspectors away during lengthy warrant proceedings, thus securing time to temporarily conceal or "clean up" safety and health hazards, would make this carefully-considered scheme virtually powerless to reach many injurious working conditions."

"This is especially true because the effect of any employer's insistence on a warrant would rapidly multiply, since his competitors would also be forced to refuse to permit inspections. Otherwise they would be saddled with safety costs their competition could easily evade."

"••• If Congress cannot regulate safety and health without such restrictions, it cannot really regulate at all."

If an employer could nonetheless gain delay by refusing to permit an inspection without a warrant, his refusal would provide him with the functional equivalent of advance notice. As a result, he often could easily conceal hazardous working conditions during the interval between refusal and issuance of the warrant.<sup>20</sup>

<sup>20</sup> For example, employers who have permitted spray-booth ventilating fans designed to remove toxic and flammable substances to become clogged with residues may swiftly restore them to operating condition before allowing them to deteriorate again after inspection. Cf. 29 C.F.R. 1910.107. Employers who have allowed employees to work in unshored trenches, 29 C.F.R. 1926.652(a) and (b), or without protective hard hats, safety belts, respirators, ear plugs, guard rails, or foot protection, 29 C.F.R. 1910.23, 1910.95(b) (1), 1910.132-1910.136; 29 C.F.R. 1926.28(a), 1926.104-1926.105, 1926.500, may quickly require use of such equipment; then rescind or ignore such orders to reduce expenses or increase production, Cf., e.g., *I.T.O. Corp. of New England v. Occupational Safety and Health Review Commission*, 540 F. 2d 543 (C.A. 1); *C. N. Flagg & Co.*, OSHRC No. 1734, 11 OSHARC Rep. 632, affirmed without opinion, 538 F. 2d 308 (C.A. 2). Guards to prevent amputations from work with hazardous machines, e.g., 29 C.F.R. 1910.212, 1910.217, may be turned off or by-passed by individual operators—a common production practice noted in the legislative history itself. See e.g., Leg. Hist. 401-402 (Sen. Saxbe). And since proof of correctable violations *inter alia* requires a showing that workers had access to hazardous machines or areas, e.g., *Brennan v. Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263-1266 (C.A. 4), on remand, 1975-1976 CCH OSHD ¶ 20,448 (decided February 20, 1976) (not yet officially reported), successful enforcement proceedings may be blocked with relative ease by temporarily disconnecting machines or barricading such areas, if advance notice of an inspector's arrival is obtained.

The fact that current agency regulations (29 C.F.R. 1903.4) provide that the Secretary will, as a matter of self-restraint, obtain a court order if the inspector is initially refused entry does

(Continued)

The alternative of routinely obtaining an *ex parte* warrant before attempting an inspection would also create substantial difficulties for enforcement of the Act. Until the decision below, most employers willingly consented to inspections without a warrant. The Act covers nearly 65 million workers engaged in their respective labor in approximately five million workplaces,<sup>21</sup> and the Secretary is currently conducting more than 80,000 inspections yearly with only 1,300 inspectors.<sup>22</sup> In these circumstances, requiring inspectors to obtain a warrant before each inspection would

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not detract from our argument that a warrant requirement would interfere with the administration of the Act. Given the broad reach of the statute, there is no meritorious ground upon which an employer can refuse entry to the inspector. See *Matter of Restland Memorial Park*, 540 F. 2d 626 (C.A. 3) (business not entitled to judicial determination whether it is an employer "affecting commerce" prior to OSHA inspection). While an employer may, under the Secretary's regulations, claim an alleged right to refuse entry to an inspector and thereby put him to the burden of seeking a court order to enforce his statutory right of entry, a decision by this Court that no warrant is required would presumably reduce an employer's incentive to do so.

<sup>21</sup> See the President's Report to the Congress on Occupational Safety and Health for 1973, pp. 57-60 (1975). There have been approximately 400,000 inspections conducted since the effective date of the Act in April 1971. However, we are advised by the Department of Labor that many of these inspections were follow-up visits to confirm abatement of previously-cited hazards. See, e.g., 29 U.S.C. 659(b). Thus, the Secretary has in fact inspected far fewer than 400,000 workplaces.

<sup>22</sup> Congress repeatedly stated its awareness that inspectors qualified to enforce the Act would be in critically short supply for an indefinite time. E.g., S. Rep. No. 91-1282, *supra*, at 12, 21-22, Leg. Hist. 152, 161-162; H.R. Rep. No. 91-1291, *supra*, at 22-31, Leg. Hist. 852-861; H.R. Conf. Rep. No. 91-1765, 91st Cong., 2d Sess. 37 (1970), Leg. Hist. 1190.

place an unwarranted burden on limited judicial and enforcement resources, creating needless delays in implementing inspections, to the detriment of the Act's basic purpose of assuring the swiftest possible abatement of occupational hazards. See *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 322-323 (C.A. 6), certiorari denied *sub nom. Winters Battery Mfg. Co. v. Usery*, 425 U.S. 991. Cf. *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, *supra*, slip op. 12; *National Independent Coal Operators' Association v. Kleppe*, *supra*, 423 U.S. at 401.

3. In light of the above, this case is not controlled by *Camara* or *See*. Instead, it is governed by the analysis of *United States v. Biswell*, *supra*. There, the Court held that a warrantless search of a locked commercial storeroom as part of a federal gun control program authorized by 18 U.S.C. 923(g), which resulted in the seizure of unlicensed firearms from a gun dealer, did not violate the Fourth Amendment. While federal regulation of firearms was not deeply rooted as a historical matter, the Court sustained the limited warrantless inspection program challenged in that case because of the program's importance in the prevention of violent crime, the fact that a warrant requirement would have impeded enforcement in light of the ease with which statutory violations could be concealed, and the limited nature of the inspection's interference with the gun dealer's right to privacy. 406 U.S. at 315-316. Here, as in *Biswell*, because "[l]arge interests are at stake" (see pp. 4-5, note 2, *supra*), Congress has adopted "a regulatory inspection

system of business premises that is carefully limited in time, place, and scope," to be conducted pursuant to "the authority of a valid statute" (406 U.S. at 315).

*Colonnade Catering Corp. v. United States*, 397 U.S. 72, also supports our position here. In that case, the Court considered the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Federal inspectors, without a warrant and without the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. After reviewing the history of federal control in the area of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand" (*id.* at 76). Thus, the Court unanimously ruled that the Fourth Amendment did not bar warrantless inspections to enforce the liquor laws and that Congress could have authorized their execution by means of forcible entry. However, it held that the particular inspection was beyond the scope of the statute because Congress had not expressly provided for forcible entry in the absence of a warrant but had instead given the government agents a remedy by making it a criminal offense under 26 U.S.C. 7342 to refuse admission to the inspectors.

We do not quarrel with the district court's observation (J.S. App. A 7a) that *Biswell* and *Colonnade Catering* turn in part on the fact that firearms

and liquor dealers have been subjected to a detailed system of governmental regulation and that those cases respectively dealt with a "pervasively regulated business" (406 U.S. at 316) and an "industry long subject to close supervision and inspection" (397 U.S. at 77). But here, too, Congress has directed that all businesses affecting interstate commerce comply with uniform safety and health standards established by the Secretary and stand ready to submit "without delay" to inspection of the working conditions of their employees. Indeed, the Occupational Safety and Health Act of 1970 is not the first congressional regulation of employee safety and health in industry as a whole rather than in particular types of businesses. It is but the most recent expression of congressional concern that began with the Walsh-Healey Act of 1936, 49 Stat. 2036, as amended, 41 U.S.C. 35 *et seq.* Thus, at least two generations of employers have been subjected to extensive federal regulation of employee safety and health.<sup>23</sup> The limited intrusion

<sup>23</sup> The legislative history of the Occupational Safety and Health Act of 1970 shows that Congress was well aware of the long history of federal and state regulation. See, e.g., 29 U.S.C. 653(b) (2), 667; S. Rep. No. 91-1282, 91st Cong. 2d Sess. 4, 10-13, 18 (1970), Leg. Hist. 144, 150-153, 158; H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 15, 21, 25 (1970), Leg. Hist. 845, 851, 855; *id.* at 58-59, Leg. Hist. 888-889 (minority views). See also *Associated Industries of New York State v. Department of Labor*, 487 F. 2d 342, 351-353 and nn. 11, 13-14 (C.A. 2). Indeed, the Act directs the Secretary to reissue pre-existing safety and health standards without notice or hearing because they had previously been widely distributed and industry was already familiar with them. See 29 U.S.C. 651 (9) and (10), 653(b) (2), 655(a); Leg. Hist. 145-146, 846-847.

here into appellee's privacy was therefore based upon longstanding regulation in the limited sphere of employee safety and health and not simply upon appellee's generalized status as a business establishment. Cf. *G.M. Leasing Corp. v. United States*, *supra*, slip op. 15; *Almeida-Sanchez v. United States*, 413 U.S. 266, 280-281 (Powell, J., concurring).

Moreover, as in *Biswell*, the statute at issue here provides procedural safeguards that limit the discretion of the inspector. As we have described *supra*, p. 8, the inspector is required to present identifying credentials and make an opening explanation of his mission to the employer, who is permitted to make a toll-free telephone call to verify the identify of the inspector. As a result, "the visible manifestations of the field officers' authority at \* \* \* [an employee workplace] provide substantially the same assurances \* \* \* [as a warrant]." *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 565. Moreover, the employer is entitled to accompany the inspector on his tour of the premises, which is limited to employee work areas. Thus, the employer is "not left to wonder about the purposes of the inspector or the limits of his task" (*United States v. Biswell*, *supra*, 406 U.S. at 316). Indeed, the limited discretion of the inspector is further shown by the fact that the selection of inspection sites is made by departmental area supervisors applying published criteria.<sup>24</sup> The workplaces to be inspected are "not chosen by officers in the

<sup>24</sup> See p. 37, note 17, *supra*.

field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources" (*United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 559). Thus, the "warrant requirement in *Camara* [which] served specific Fourth Amendment interests \* \* \* would make little contribution" with respect to inspections under the Act (*id.* at 565).

Finally, the decision in *Biswell* reflects the Court's recognition that the gun inspection powers there at issue were necessary to implement a regulatory system of great importance to society. Here, Congress has similarly determined that the safety of the Nation's workers is of great societal importance. As we have pointed out *supra*, pp. 19-22, if the Occupational Safety and Health Act is to be an effective means of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651), unannounced inspections are essential to the statutory scheme. Cf. *Nixon v. Administrator of General Services*, No. 75-1605, decided June 28, 1977, slip op. 30 and n. 21. While the Court in *Biswell* characterized the inspection in *See* as designed to discover "conditions that were relatively difficult to conceal or to correct in a short [period] of time" (406 U.S. at 316), here, as in *Biswell*, the object of the inspector's mission is easily concealed. Thus, "the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be

preserved, the protections afforded by a warrant would be negligible" (*ibid.*). Thus, the Court in *Biswell* had "little difficulty in concluding that where \* \* \* regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute" (*id.* at 317).

In sum, virtually all of the ingredients that the Court has found significant in concluding that statutorily authorized inspections may be conducted without a warrant—express congressional authorization (see, *e.g.*, *United States v. Watson*, 423 U.S. 411), compelling governmental need in the light of the particular purpose of the inspection involved, the unsuitability of the subject matter for the making of a meaningful "cause" determination, and limited interference with legitimate privacy expectations—are present in this case. *Biswell* accordingly supports the validity of the warrantless inspections under the Occupational Safety and Health Act. Accord: *Brennan v. Buckeye Industries, Inc.*, 374 F. Supp. 1350 (S.D. Ga.); *Dunlop v. Able Contractors*, D. Mont., Civ. No. 75-57-BLG, decided December 15, 1975, appeal pending, C.A. 9, No. 76-1615; *Usery v. Northwest Orient Airlines*, E.D. N.Y. No. 76-C-2177, decided June 10, 1977. Contra, *Brennan v. Gibson's Products, Inc. of Plano*, 407 F. Supp. 154, 162-163 (E.D. Tex.) (three-judge court), appeal pending, C.A. 5, No. 76-1526; *Dunlop v. Hertzler Enterprises, Inc.*, 418 F.

Supp. 627 (D. N. Mex.) (three-judge court), appeal pending, C.A. 10, No. 76-2020; *Usery v. Rupp Forge Co.*, N.D. Ohio, No. C-76-385, decided April 22, 1976, appeal pending, C.A. 6, No. 76-1960; *Usery v. Centrif-Air Machine Co.*, 424 F. Supp. 959 (N.D. Ga.), appeal pending, C.A. 5, No. 77-1511.

*C. A large number of federal regulatory statutes validly provide for similar warrantless inspections of business premises*

Although the decision of the district court deals only with the inspection provisions of Section 8(a) of the Occupational Safety and Health Act of 1970, its holding that *Camara* and *See* require OSHA inspectors to obtain a warrant to enter the premises of business establishments would arguably be applicable to a host of comparable federal regulatory statutes providing for warrantless inspections to enforce congressionally mandated standards for safety and health. For example, inspectors of the Food and Drug Administration are authorized "to enter, at reasonable times, any factory \* \* \* in which food, drugs, devices, or cosmetics are manufactured \* \* \* and \* \* \* to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory \* \* \*" (21 U.S.C. 374 (a)). As in the case of the Occupational Safety and Health Act, the efficacy of the Food, Drug and Cosmetic Act depends upon the Food and Drug Administration's ability to make unannounced random inspections. Accordingly, in the only decided cases to

date, the constitutionality of such warrantless inspections under the Food, Drug and Cosmetic Act have been upheld. See *United States v. Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. Okla.); *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1376-1377 and nn. 12-15 (D. Del.); *United States v. Litvin*, 353 F. Supp. 1333 (D. D.C.). Accord: *Youghioghenny and Ohio Coal Co. v. Morton*, *supra* (Coal Mine Health and Safety Act of 1969); *United States ex rel. Terraciano v. Montanye*, *supra*, 493 F. 2d at 684-685 (state narcotics statute); *United States v. Western & A. R.R.*, 297 Fed. 482, 484-485 (N.D. Ga.) (Railway Safety Appliance Act).

These decisions have accepted our submission, as finally articulated by this Court in *Colonnade Catering and Biswell*, that Congress is fully empowered to authorize limited warrantless inspections as part of a regulatory system as long as they do not intrude upon legitimate privacy expectations and where the antecedent evaluation of a magistrate would not afford meaningful protection. Indeed, Congress authorized such warrantless inspections at least as early as Section 6 of the Railway Safety Appliance Act of 1908, 36 Stat. 915, as amended, 45 U.S.C. 29, which provides that "[e]ach inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of \* \* \* this title \* \* \*." It is diffi-

cult to believe that Congress<sup>25</sup> and the states<sup>26</sup> during

<sup>25</sup> Similar or identical provisions are included in many federal statutes. See, e.g., 7 U.S.C. (Supp. V) 136g (Environmental Pesticide Control Act); 7 U.S.C. 2146(a) (Animal Welfare Act of 1970); 8 U.S.C. 1225(a) (Immigration and Nationality Act); 15 U.S.C. 1270 (inspection of any factory or warehouse for "hazardous substances" by Secretary of Health, Education and Welfare); 15 U.S.C. (Supp. V) 1401(a)(2) (National Traffic and Motor Vehicle Safety Act); Pub. L. 94-469, Section 2, 90 Stat. 2003, (Toxic Substances Control Act); 21 U.S.C. 603 (Secretary of Agriculture's inspection of meat and meat products); 21 U.S.C. 1034(a), (b), (d) (Egg Products Inspection Act); 26 U.S.C. 5146(b) (Internal Revenue Code of 1954); 26 U.S.C. 7606 (Internal Revenue Code of 1954); 29 U.S.C. 211(a) (Fair Labor Standards Act); 30 U.S.C. 723, 724 (Metal and Nonmetallic Mine Safety Act); 30 U.S.C. 813 (Coal Mine Health and Safety Act); 33 U.S.C. (Supp. V) 467(a) (Water Pollution Control Act); 41 U.S.C. 38 (Walsh-Healey Act); 41 U.S.C. 53 (Anti-Kickback Act); 42 U.S.C. 262(c) (Public Health Service Act); 42 U.S.C. 263i (Clinical Laboratories Improvement Act); 42 U.S.C. 1857c-9 (Clean Air Act); 42 U.S.C. 1857f-6 (Air Pollution Control Act); 42 U.S.C. 2035(c), 2051 (Atomic Energy Act); 42 U.S.C. (Supp. V) 5413(a) and (b) (National Mobile Home Construction and Safety Standards Act of 1974); Section 3007, as added, Pub. L. 94-580, 90 Stat. 2810 (Solid Waste Disposal Act); 45 U.S.C. 437(c) (Railroad Safety Act); 46 U.S.C. 239, 362, 404 (Bureau of Marine Inspection Act); 46 U.S.C. 408 (Coast Guard inspection of vessel boiler plates at manufacturer's plant); 49 U.S.C. 1425(b) (Federal Aviation Act); 49 U.S.C. 1677(a)(3), 1681(b) (Natural Gas Pipeline Safety Act); 49 U.S.C. (Supp. V) 1808(c) (Transportation Safety Act of 1974). See also *Colonnade Catering Corp. v. United States*, 410 F. 2d 197, 204 n. 6 (C.A. 2), reversed on another ground, 397 U.S. 72.

<sup>26</sup> Numerous state occupational safety and health statutes have similar warrantless inspection provisions. See, e.g., Alas. Stats., § 18.60.083 (1974); Ariz. Rev. Stat. Ann., § 23-408 (1971); Cal. Labor Code, § 6314(a) (West 1976); Colo. Rev. Stat., § 8-11-106 (1974); Ill. Ann. Stat., c. 48, § 59.2(b)(1) and (2) (1969); Ind. Stats. Ann., § 22-8-1.1-23.1 (1974); Md. Ann. Code, Art 89, § 35 (a) (1976); Minn. Stat. Ann., § 182.659, Subd. 1 (1966); Mont. Rev. Code, § 4213 (1) and (2) (1961); Nev. Rev. Stat., § 618.225

the last 70 years would have enacted such a large number of regulatory statutes providing for warrantless inspections if the rule were understood to be otherwise or even subject to substantial uncertainty. The district court's departure from this settled understanding and practice under the Fourth Amendment calls for reversal by this Court.

II. EVEN IF A WARRANT IS REQUIRED, THE DISTRICT COURT SHOULD HAVE UPHOLD THE CONSTITUTIONALITY OF THE ACT

Even if, despite our contrary submission, this Court should conclude that the Fourth Amendment precludes warrantless safety inspections of comprehensively regulated working areas, the district court erred in declaring 29 U.S.C. 657(a) "unconstitutional and void" and enjoining the Secretary from "acting

(1975); N. Mex. Stat. Ann., § 59-14-9 (1974); N. C. General Stats., §§ 95-133, 95-136 (1975); Ore. Rev. Stat., § 654.067 (1975); Tenn. Code Ann., § 50-520 (1976); Vt. Stats. Ann., Tit. 21, § 206 (1971); Va. Code, §§ 40.1-6, 40.1-10 (1976); Wisc. Stats. Ann., § 101.02(15)(g) (1973).

Eleven states (Kentucky, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Vermont, Virginia, and Wyoming) have filed a brief *amici curiae* in this case urging reversal of the district court.

Maryland, Oregon, and Alaska statutes analogous to the Act's inspection provisions have been held unconstitutional by state courts relying upon *Brennan v. Gibson's Products Inc. of Plano*, 407 F. Supp. 154 (E.D. Tex.). See *Epstein v. Fitzwater*, No. 6838EQ, decided September 2, 1976 (Cir. Ct. Garrett County, Md.); *Oregon v. Keith R. Foster, dba Keith Mfg. Co.*, Civ. No. 5943, decided November 1, 1976 (Cir. Ct. Jefferson County, Ore.); *Alaska v. Alaska Truss & Millwork*, No. 2903, decided June 2, 1977 (Alaska S. Ct.).

or attempting to act pursuant to or in furtherance of" that Section (J.S. App. A 11a-12a). It should instead have followed this Court's rule that "under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment," *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 272, and interpreted the statute to meet Fourth Amendment requirements. See also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (Brandeis, J., concurring).<sup>27</sup> That course has been consistently followed by the Court with respect to administrative inspections, for it did not invalidate the ordinances in *Camara* and *See* or the statute in *Almeida-Sanchez*. It is also the course followed by all other district courts that have found warrantless OSHA inspections impermissible. See pp. 46-47, *supra*.

Although we believe that Congress intended to authorize warrantless inspections, it is equally clear that interpreting the statute to meet Fourth Amendment requirements would more closely approximate congressional intent than totally eliminating the authority to inspect. 29 U.S.C. 677; cf. *Tilton v. Richardson*, 403 U.S. 672, 684. Indeed, Representative Steiger, the author of the version of Section 8(a) of

<sup>27</sup> In light of *Camara v. Municipal Court*, 387 U.S. 523, any warrant requirement read into the inspection provisions of the Act "will not necessarily depend upon specific knowledge \* \* \* of the particular \* \* \* [workplace]" (*id.* at 538), as in a search pursuant to a criminal investigation. Instead, the Secretary's showing that the location apparently houses a covered employee workplace should suffice to obtain a warrant under the *Camara* standard.

the Act which ultimately prevailed in conference, stated that while prompt unannounced inspections are essential to the Act's enforcement, they were meant to be carried out "in accordance with applicable constitutional protections." Leg. Hist. 1077. That explicit expression of congressional intent requires that the constitutionality of the Act be upheld.

#### CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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**IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1977**

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**RAY MARSHALL,  
SECRETARY OF LABOR, ET AL.,**

*Appellants,*

**vs.**

**BARLOW'S, INC.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

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**BRIEF FOR THE APPELLEE**

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No. 76-1143  
IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

RAY MARSHALL,  
SECRETARY OF LABOR, ET AL.,  
*Appellants,*

vs.

BARLOW'S, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLEE

STATEMENT

Appellee, Barlow's, Inc. (hereinafter referred to as Barlow's), is an Idaho corporation located in Pocatello, Idaho (App. 24). Barlow's has been in business installing electrical, plumbing and airconditioning equipment for approximately seventeen years in the vicinity of Pocatello, Idaho (App. 24-25). Some of the materials, such as sheet metal, used by the company in its fabrication and installation business is produced outside of the State of Idaho (App. 25). Whereas Barlow's has State of Idaho electrical and plumbing licenses, no aspect of this business is licensed by the United States or any agency thereof (App. 25).

At 11:00 A.M. on September 11, 1975, an OSHA inspector entered into the customer service area of the business, presented his credentials and explained the purpose of his visit to Ferrol G. "Bill" Barlow, the company's president and general manager (App. 25). Following the initial interview, the OSHA inspector indicated to Mr. Barlow that he was prepared to conduct a "general schedule" investigation of the non-public portion of the business, which portion is completely walled off from the public and customer service area (App. 25). Upon Mr. Barlow's inquiry, the inspector advised him that there had been no complaints against the business and that it was merely a routine inspection (App. 25-26). At this time Mr. Barlow inquired whether the inspector had a search warrant and denied the inspector the right to inspect the non-public area of the premises upon learning that he did not have such a warrant (App. 25). When asked by the inspector why he refused to allow the inspection, Mr. Barlow said that the Fourth Amendment required that a warrant be obtained (App. 25). All parties agree that the OSHA inspector did not have cause, probable or otherwise, to believe a violation existed, nor was he in possession of a complaint by an employee of Barlow's (J.S. App. A 2a).

Following Mr. Barlow's refusal, the Secretary of Labor (hereinafter referred to as the Secretary) delayed seeking compulsory process to authorize entry until December 13, 1975, at which time the Secretary petitioned the court below for an order compelling entry, inspection and investigation (J.S. App. A 2a). At a show cause hearing on December 30, 1975, the Secretary's petition was granted and an order entered

authorizing entry by OSHA into Barlow's premises for inspection purposes (J.S. App. A 2a).

On January 5, 1976, the court's order was presented to Mr. Barlow, and he again declined to permit the inspection. The next day Barlow's filed the instant action requiring the convening of a three-judge court to enjoin the enforcement of the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651, et seq., on the ground of repugnance to the Fourth Amendment of the United States Constitution (J.S. App. A 3a).

On page 10 of his brief, the Secretary recites that on January 15, 1976, a single judge denied Barlow's request for preliminary relief. It should be pointed out that the denial of the preliminary relief referred to was based on the court's assumption, expressed on the record, that the U.S. Attorney would not proceed with any contempt proceedings in the collateral matter<sup>1</sup> pending a decision by the three-judge panel, which was formed at this same hearing. Barlow's was invited by the court to reapply for preliminary relief if this assumption of the court proved wrong. As a result of these comments by the court, a stipulation was entered into by the parties in the collateral inspection case to stay prosecution of that matter pending the outcome of the instant case.

Barlow's is satisfied with the accuracy of the remainder of the Secretary's statement of the proceedings below.

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<sup>1</sup>In the Matter of Establishment Inspection of Barlow's, Inc., Civil No. 4-75-58 (D. Idaho, filed Dec. 13, 1975).

## SUMMARY OF ARGUMENT

### I

At issue in this case is the constitutionality of warrantless inspections conducted pursuant to Section 8(a) of the Occupational Safety & Health Act of 1970, 84 Stat. 1598, 29 U.S.C. §§ 651, et seq. This Court's holdings in the companion cases of *Camara vs. Municipal Ct.*, 387 U.S. 523 (1967), and *See vs. City of Seattle*, 387 U.S. 541 (1967), established the rule that, except in certain carefully defined classes of cases, an administrative inspection of a corporation's private commercial property is "unreasonable" unless conducted pursuant to a search warrant issued by an independent judicial officer. The Secretary relies on two of this Court's cases which narrowed the scope of the doctrine developed in *Camara* and *See*: *Colonnade Catering Corp. vs. U.S.*, 397 U.S. 72 (1970), upholding the warrantless inspection of the premises of a licensed retail liquor dealer, and *U.S. vs. Biswell*, 406 U.S. 311 (1972), permitting the warrantless inspections of licensed firearms dealers. However, in *Almeida-Sanchez vs. U.S.*, 413 U.S. 266 (1977), this Court construed its holdings in *Colonnade* and *Biswell* and found that the exceptions to the *Camara* and *See* rule were limited to governmentally licensed and pervasively regulated enterprises. The rule of *Camara* and *See*, as reaffirmed in *Almeida-Sanchez*, was again confirmed in *Air Pollution Variance Bd. vs. Western Alfalfa Corp.*, 416 U.S. 861 (1974), in express terms and in the context of administrative inspections conducted for the purpose of promoting health and sanitation.

A considerable body of judicial opinion has developed

throughout the federal and state courts regarding the meaning and constitutionality of the inspection provisions of OSHA from the vantage point of this Court's decisions in *Almeida-Sanchez* and *Western Alfalfa*. With a nearly unanimous voice in many exceptionally well-reasoned decisions, these courts have held that warrantless OSHA inspections violate the Fourth Amendment of the United States Constitution.

### II

Despite the scope of OSHA's jurisdiction being extremely broad and the congressional findings supporting it inspecific, the Secretary contends that the administrative safeguards contained in OSHA for the conduct of inspections are constitutionally sufficient because the privacy interests of employers in their commercial workplaces occupied by employees is very limited. An analysis of the historical development of the Fourth Amendment refutes the Secretary's position that such privacy interests of an employer are limited or diminished by the presence of employees. Despite pre-Revolutionary rhetoric exhorting against the prospect of British intrusion into hearth and home, the historical record clearly shows that the intrusion complained of occurred in business and commercial settings as a result of the British attempt to suppress smuggling. Hence, the Fourth Amendment safeguards were developed to remedy unreasonable governmental intrusion into workplaces as well as homes. The Fourth Amendment safeguards did not result from a wave of popular political opinion. Rather, the genesis of these safeguards was the unheralded, but intense, struggle between Colonial judges and the English executive. Hence, there is an element of separation of powers

involved here. Speaking in terms of the rights of the people, the Fourth Amendment represents a judicial check of the executive's power to intrude into non-public interests, be they domestic or commercial. Therefore, the Fourth Amendment protection of privacy interests can, in some instances, have little to do with "privacy" in the sense of solitude or confidentiality. The people's right to be protected in their persons (individual and corporate) from governmental intrusion is the definition of this privacy interest, which is quite absolute. These privacy interests are never "diminished" or "limited" by a governmental interest to inspect as argued by the Secretary.

These absolute privacy interests are, however, subject to reasonable governmental search. The question is not one of balancing these privacy interests against the interests of the government to search. Since these privacy interests are absolute, no such balancing is possible. As brought out in *Camara*, the question is not a matter of balancing privacy interests against governmental interest; rather it is a question of the reasonableness of the search. The "governing principle" reaffirmed by *Camara* requires that, except in certain carefully defined classes of cases, every nonconsensual official intrusion into privacy interests is "unreasonable" unless it has been authorized by a valid search warrant. The issue in this case is whether the inspection sought by the inspector can be made without a warrant and not whether a search warrant should be issued on the facts.

In determining whether the proposed governmental intrusion falls into the narrow class of cases excepted

from the warrant requirement, *Camara* advises that the question is whether the burden of obtaining a warrant is likely to frustrate the government's purpose behind the search. The only relevant civil purposes recognized by this Court as not subject to frustration by the warrant procedure are described in *Colonnade* and *Biswell* and delimited by the decisions of *Almeida-Sanchez* and *Western Alfalfa*: purposes associated with licensing and pervasive regulation by government. There are no licensing programs under OSHA. The regulatory provisions of OSHA, both in purpose and effect, do not regulate or control the nature, operation, or purpose of any particular businesses or industries or types of industries. The purpose of OSHA is to protect the safety and health of employees, not to regulate the conduct or operation of any particular enterprise or types of enterprise. Since "pervasive" regulation has been defined by *Colonnade* and *Biswell*, as construed by *Almeida-Sanchez* and *Western Alfalfa*, to mean the licensing and/or detailed, close regulation of the purpose, operation, and conduct of particular businesses, OSHA inspections cannot constitutionally be excepted from warrant requirements. This Court has often rejected and should continue to reject appeals such as the Secretary's to broaden the category of excepted warrantless searches on grounds of administrative efficiency and efficacy of administrative safeguard procedures.

### III

Administrative search warrants suggested by *Camara* need not be "synthetic". Based on probable cause in a civil context, they consider facts other than those arising in criminal situations. The facts involved in

criminal contexts are almost universally concerned with an individual. Facts beyond the context of individuals' concerns must be considered in determining probable cause in administrative warrants. 'Probable cause' is the standard by which particular decision to search is tested against the constitutional mandate of reasonableness." *Camara*, 387 U.S. at 534. It is here, in the determination of the probable cause standard for the issuance of a search warrant, that the only "balancing test" arises. As shown earlier, there is no balancing test afforded for determining whether a proposed search should be excepted from warrant requirements. However, in determining what is reasonable, the need to search is balanced against the absolute privacy interests which will be invaded. Whereas these privacy interests are not flexible, the need to search and procedural safeguards involved in the search are flexible and should be considered in determining reasonableness by the independent judicial officer supervising the search. In its argument, Barlow's sets forth several standards which, it submits, should be considered in the issuance of all civil warrants. The Secretary's position that administrative inspection warrants might be issued by a reviewing magistrate simply on the basis of the OSHA statutory safeguard should be summarily rejected by the Court.

#### IV

A careful study of the legislative history of OSHA conclusively demonstrates two facts: (1) Congress intended the inspection program of OSHA to be conducted on the basis of warrantless entry, and (2) Congress was aware of the possible constitutional infirmity

of such a program. The minority report of the House Committee on Education and Labor succinctly spelled out the constitutional dangers of providing for warrantless searches in the context of OSHA's broad jurisdiction and purpose. The minority report expressly referred to the holdings of *Camara* and *See* and the need for judicial supervision—particularly in the context of the broad extension of governmental intrusion proposed by OSHA. Nevertheless, the bill's author, Congressman William Steiger, made it clear that warrantless inspection authority was essential to the program enacted by Congress. In other words, the inspection program designed by Congress was constructed around the concept of warrantless inspections and affirmatively rejected a program based on inspections conducted pursuant to search warrants. Barlow's submits that to judicially impose an inspection program based on a warrant procedure would directly contradict the intent of Congress. Therefore, it is submitted that this Court's proper action should be to affirm the decision of the court below that Section 8(a) is unconstitutional and void.

#### ARGUMENT

##### I

THE HOLDINGS OF *CAMARA* AND *SEE* CONTROL AND SUPPORT THE DECISION OF THE DISTRICT COURT BELOW THAT WARRANTLESS § 8(a) OSHA INSPECTIONS VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

"[O]ne governing principle, justified by history and by current experience, has consistently been fol-

lowed: Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara vs. Municipal Ct.*, 387 U.S. 523, 528-529 (1967).

The principle recited above by the Court in *Camara vs. Municipal Ct. supra*, forms the basis upon which the court below built the framework of its decision that warrantless inspections purportedly conducted under Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. § 657(a) (hereinafter referred to as Section 8(a) of the Act), are unconstitutional as repugnant to the Fourth Amendment of the United States Constitution<sup>2</sup> and that Section 8(a) of the Act is unconstitutional and void as mandating such warrantless inspections. J.S. App. A 5a-6a. In *Camara*, appellant was awaiting trial upon a criminal charge of violating the San Francisco Housing Code by refusing to give permission to a city housing inspector to inspect his residence without a search warrant.<sup>3</sup> In expressly overruling *Frank vs. Maryland*,

<sup>2</sup>The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

See Brief for the Appellants, pp. 3-4, for the text of Section 8(a) of the Act.

<sup>3</sup>The inspector sought to inspect pursuant to § 503 of the San Francisco Housing Code, which provides as follows:

"Section 503. RIGHT TO ENTER BUILDING. Authorized employees of the city departments or city agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the city to perform any duty imposed on them by the municipal code." Another section of the housing code provided for criminal penalty for refusal to allow such an inspection. See, *Camara vs. Municipal Ct.*, 387 U.S. at 526, 527.

359 U.S. 360 (1959)<sup>4</sup>, this Court concluded that Mr. Camara had a constitutional right to insist that the inspectors obtain a search warrant and that he could not be constitutionally convicted for refusing to consent to the inspection. 387 U.S. at 540.

*Frank vs. Maryland* and its progeny were likewise expressly overruled by the companion case to *Camara*: *See vs. City of Seattle*, 387 U.S. 541 (1967). Norman See sought reversal of his conviction for refusing to admit the Seattle Fire Department's representative (also lacking probable cause) to make a warrantless inspection of his locked commercial warehouse. The proposed inspection was part of a routine, city-wide program conducted pursuant to city ordinance.<sup>5</sup>

In combining the holdings of these cases, the Court in *See* noted that "in *Camara*, we held that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code inspection of his personal residence. The only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences." 387 U.S. at 542. On this issue, the Court held:

<sup>4</sup>In *Frank vs. Maryland*, 359 U.S. 360 (1959), by a five-to-four vote, this Court upheld a long line of cases in sustaining the conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant. In *Eaton vs. Price*, 364 U.S. 263 (1960), a similar conviction was affirmed by an equally divided Court.

<sup>5</sup>Seattle City Ordinance No. 87870, c8.01 provided the authority for the inspection program, and Mr. See was arrested and charged with violation of subsection 8.01.050 of the code which provided as follows:

"INSPECTION OF BUILDING AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this title, and of any other ordinance concerning fire hazards." 387 U.S. at 541.

"[W]e see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has the right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543.

In holding that Mr. See could not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry into his locked warehouse, this Court concluded "that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. at 545.

It was clear that the court below was of the opinion that, taken together, *Camara* and *See* stand for the proposition that while non-consensual administrative inspections of commercial premises are authorized, such inspections may only be accomplished upon presentation of a warrant based upon satisfaction of a

flexible probable cause standard.<sup>6</sup> However, in reaching its decision, the court below had to consider two subsequent decisions of this Court allowing warrantless inspections. In *Colonnade Catering Corp. vs. U.S.*, 397 U.S. 72 (1970), the Court narrowed the scope of its holding in *Camara* by allowing warrantless inspection of the premises of a retail liquor dealer. Similarly, in *U.S. vs. Biswell*, 406 U.S. 311 (1972), the *Colonnade* reasoning was expanded to permit warrantless inspections of firearms dealers. Nevertheless, in the light of more recent precedent<sup>7</sup> available at the time of the decision hereinbelow, the Idaho district court in the present case construed *Colonnade* and *Biswell* as narrow exceptions to *Camara* and *See*, fitting into the *Camara* categorization of "certain carefully defined classes of cases" (J.S. App. A 7a):

"We simply cannot overlook the fact that in *Colonnade* and *Biswell* the Court dealt with an 'industry long subject to close supervision and inspection' (*Colonnade*, 397 U.S. at 77), and a 'pervasively regulated business' (*Biswell*, 406 U.S. at 316). We believe that both of these cases fit into the *Camara* categorization of 'certain carefully defined classes of

<sup>6</sup>On a similar fact situation dealing with a warrantless, non-consensual OSHA inspection, the District Court of the Northern District of Georgia explicitly reached this conclusion eleven days after the court below rendered its opinion: *Usery vs. Centrif-Air Mach. Co.*, 424 F.Supp. 959 (N.D. Ga. 1977), appeal docketed, No. 77-1511, 5th Cir., voluntarily dismissed July 28, 1977.

<sup>7</sup>See *Alameida-Sanchez vs. U.S.*, 413 U.S. 266 (1973) (expressly reaffirming *Camara* and *See*); *Air Pollution Variance Bd. vs. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (reaffirming *See* and *Camara* in express terms and in the context of administrative inspections conducted for purpose of promoting health and sanitation); and *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154, (E.D. Tex. 1976) (three-judge court). The Court relied heavily on the well-reasoned opinion by G. Gee, Circuit Judge, which reviewed and determined the meaning and constitutionality of the inspection provisions set forth in § 8(a) of OSHA from the vantage point of the instruction provided by *Alameida-Sanchez* and *Western Alfalfa*.

cases.' We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce. 29 U.S.C. § 651 (a) (3). As such, it applies to a wide variety of over six million work places and does not focus on one particular type of business or industry. It cannot be questioned that this broad spectrum of businesses can be distinguished from the heavily regulated liquor and firearm industries encountered in *Colonnade* and *Biswell, supra.*" J.S. App. A 7a.

The court below found that the warrantless inspection provisions of OSHA were controlled by the *Camara* and *See* cases. In holding that non-consensual, warrantless searches of business premises under OSHA were repugnant to the Fourth Amendment, the court below adopted the reasoning of *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976), with the major exception that it did not follow the case in sustaining the constitutionality of Section 8(a) of the Act:

"While we adopt, in general, the similar reasoning employed there, we decline the invitation to judicially redraft an enactment of Congress. Unlike the *Gibson's Products* court, we cannot accept the proposition that the language of the OSHA inspection provisions envision the requirement that a warrant be obtained before any inspection is undertaken. Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty." J.S. App. A 9a-10a.

Leaving aside for the moment the question of whether Section 8(a) of the Act is unconstitutional and void on its face<sup>9</sup>, it is clear that the court below and the court in *Gibson* found the inspection provisions of the Act violative of the Fourth Amendment of the Constitution at least to the extent that such provisions purported to authorize warrantless inspections.<sup>10</sup> In concluding this review of the decision below, Appellee draws the Court's attention to the great wave of almost unanimous judicial opinion that has been expressed by both federal and state courts across the land in condemning warrantless inspections under Section 8(a) of the Act as violative of the provisions of the Fourth Amendment to the United States Constitution.<sup>10</sup> In reading these

<sup>9</sup>The issue of whether the act is void on its face is discussed in part IV.  
<sup>10</sup>*Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 at 407; (E.D. Tex. 1976) *Cf., Empire Steel Mfg. Co. vs. Marshall*, Civil No. 77-48-BLG (D. Mont., September 1, 1977).

<sup>10</sup>Decisions finding warrantless inspections purportedly conducted under Section 8(a) of the Act to be unconstitutional:

*Empire Steel Mfg. Co. vs. Marshall*, Civil No. 77-48-BLG (D. Mont., Sept. 1, 1977). *Marshall vs. Shellcast Corp.*, Civil No. 77-P-0995-E (N.D. Ala., August 10, 1977); *Usery vs. Centrif-Air Mach. Co.*, 424 F.Supp. 959 (N.D. Ga. 1977), appeal docketed, No. 77-1511, 5th Cir., voluntarily dismissed July 28, 1977; *Re: Work Site Inspection of Alfred Calcagni & Sons*, Civil No. 77-0046M (D. Rhode Is., June 28, 1977); *Dunlop vs. Hertzler Ent., Inc.*, 418 F.Supp. 627 (D. N.Mex. 1976) (three-judge court), appeal docketed No. 76-2020, 10th Cir.; *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976) (three-judge court), appeal docketed, No. 76-1526, 5th Cir.; *Usery vs. Rupp Forge Co.*, Civil No. C-76-385 (N.D. Ohio, April 22, 1976), appeal docketed, No. 76-1960, 8th Cir.; *Yocom vs. Burnette Tractor Co., Inc.*, Case No. CA-336-MR (Ct. App. Ky., May 27, 1977), CCH OSHD § 21, 851.

Opinions finding § 8(a) of the Act or its state counterpart unconstitutional for mandating warrantless inspections of private premises:

*Marshall vs. Great Lakes Dredge & Dock Co.*, Civil No. Misc. (S.D. Cal., July 20, 1977) (order compelling warrantless inspection denied, motion to dismiss granted); *Barlow's, Inc. vs. Usery*, 424 F.Supp. 437 (D. Idaho 1976). *prob. juris. noted, sub nom. Marshall vs. Barlow's, Inc.*, U.S. \_\_\_\_\_, 97 S.Ct. 1642 (April 18, 1977); *Weyerhaeuser Co. vs. Reizen*, Civil No. 771652 (E.D. Mich., filed May 2, 1977) (*dictum*, court held that Michigan state statute might constitutionally provide for issuance of search warrant upon showing of probable cause, the federal statute, unconstitutionally, did not); *Woods & Rhode, Inc. vs. Alaska*, 565 P.2d 138 (Alaska 1977) (based on Alaska Const. Art. I, §§ 14 and 22); *Alaska vs. General Home Repair & Roofing*, Civil No. 76-1651 (3rd Dist. Alaska, February \_\_\_\_\_, 1977) (based on U.S. Const., Fourth Amend. and Alaska Const. Art. I § 14), 6 BNA Occu-

opinions, it becomes readily apparent that the judicial criticism of the warrantless inspections under Section 8(a) of the Act is deeply felt by the judges.<sup>11</sup> Many of these well-reasoned decisions refer at length to the historical and constitutional roots in mustering support for the condemnation of OSHA's modern "general warrants."<sup>12</sup>

pational Safety & Health Reporter 948; *Calif. vs. Melvin Salwasser*, Case No. F-24271 (Fresno, Cal. Mun. Ct., March 24, 1977), CCH OSHD § 21, 797; *Epstein vs. Fitzwater*, Civil No. 6838EQ (Cir. Ct. Garrett Cnty., Md., September 2, 1976), 6 BNA Occupational Safety & Health Reporter 948; *New Mex. Environ. Improve. Agency vs. Albuquerque Publish. Co.*, Civil No. 9-76-04397 (2nd Dist. N.Mex., January 20, 1977), CCH OSHD § 21,513; *Oregon vs. Keith R. Foster*, Civil No. 5943 (Cir. Ct. Jefferson Cnty., Ore., November 1, 1976), CCH OSHD § 21,256; *Baird vs. Utah*, Civil No. 237878 (3rd Dist. Utah, January 9, 1977), CCH OSHD § 21,523.

CONTRA: The following three opinions declared that warrantless inspections conducted pursuant to § 8(a) of the Act were constitutional. However, one of the opinions has been overruled, and the subject proposition in another of these opinions was dictum:

*Usery vs. N.W. Orient Airlines*, Civil No. 76-C-2177 (E.D. N.Y., June 10, 1977) (dictum); *Dunlop vs. Able Contractors*, Civil No. 75-57-BLG (D. Mont., December 15, 1975) (court's position reversed in *Empire Steel Mfg. Co. vs. Marshall*, supra); and *Brennan vs. Buckeye Ind.*, 374 F.Supp. 1350 (S.D. Ga. 1974).

It is noteworthy that the one remaining opinion in point, *Brennan vs. Buckeye Ind., Inc.*, was rendered without the benefit of this Court's opinions in *Almeida-Sanchez vs. U.S.*, 413 U.S. 266 (1973); and *Air Pollution Variance Bd. vs. Western Alfalfa Corp.*, 416 U.S. 861 (1974), as was carefully pointed out by the Court in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 at 160-161 (1976).

<sup>11</sup>Prior to the *Gibson* case and ruling without the benefit of this Court's decisions in *Almeida-Sanchez* and *Western Alfalfa*, Judge Batten reluctantly granted OSHA's petition to make a warrantless inspection of a contractor's work site in *Dunlop vs. Able Contractors*, Civil No. 75-57-BLG (D. Mont., December 15, 1975), with the following comment:

"This decision is regrettable; I find the Occupational Safety and Health Administration and its position in this case to be very distasteful."

Subsequently, Judge Batten has had the opportunity to overrule this decision in *Empire Steel Mfg. vs. Marshall*, supra.

<sup>12</sup>In *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. at 158, the court decided that OSHA compliance officers have been invested "with something very like a general warrant."

The court below in footnote 4 at J.S. App. 7a-8a stated:

"We of course, do not sit in judgment of the wisdom of Congress. Our only concern is the alleged affront to the Fourth Amendment. The rationale of the anonymous saying 'expediency is the argument of tyrants, it precedes the loss of every human liberty' seems of forceful application here. That the end result may be laudable and desirable does not justify the means used to accomplish it when constitutional prohibitions are confronted. To paraphrase Burke, *Impeachment of Warren Hastings*, February 16, 1788; 'The constitution (law) and arbitrary power are in eternal omity.'"

## II

### THE PRIVACY INTERESTS PROTECTED BY THE FOURTH AMENDMENT WOULD BE VIOLATED BY WARRANTLESS OSHA INSPECTIONS.

As pointed out above, there has developed a near consensus among the courts in both state and federal jurisdictions that non-consensual OSHA inspections must be conducted within a warrant framework.<sup>13</sup> The wellspring of authority subjecting OSHA inspections to warrant requirements is the decision in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976). In determining the meaning and constitutionality of the inspection provisions set forth in Section 8(a) of the Act, the three-judge panel unanimously held:

"These authorities and others cited below convince us that facially the inspection provisions of OSHA amount to just such an attempt at a broad partial repeal of the Fourth Amendment as is beyond the powers of Congress.

\* \* \*

"We deal, as is the rule in such cases, with a clash of near absolutes. On the one hand we have the Fourth Amendment, a safeguard to ordered liberty indispensable and, historically at least, preeminent. On the other stands the congressional enactment, clearly subject to the interpretation that diminishing the injuries, and consequent loss of suffering, caused by hazardous working conditions justifies investing

<sup>13</sup>See footnote 10.

OSHA compliance officers with something very like a perpetual general warrant.

• • •

"OSHA's sweep is broad, and Congress' findings supporting it are slender. Made subject to its warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all 'environments' where these employees work. It thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barbershops—indeed, the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." 407 F. Supp. at 157, 158 and 161.

As is the case with Barlow's the court noted that *Gibson* (unlike the circumstances in *Colonnade* and *Biswell*) was not licensed, that it had no history of close regulation, and that there was no "reason whatever" to believe hazardous working conditions prevailed in the area sought to be searched. Again referring to the nature of the contemplated search by the OSHA inspectors, the court observed:

"Instead, we contemplate a roving commission in the vein of those considered in *Camara*, *See* and *Alameda-Sanchez*, exercised by these compliance officers in their unfettered discretion. No emergency existed, and no functional or general equivalent of probable cause, such as *Camara* envisions is shown. This warrantless search would not comply with Fourth Amendment standards and cannot be countenanced." 407 F. Supp. at 162.

The Secretary challenges the proposition that warrantless inspections authorized under Section 8(a) of the Act are incompatible with the Fourth Amendment's guarantee against unreasonable searches and seizures. The government contends "that the safeguards contained in the act for the conduct of such inspections are sufficient to meet Fourth Amendment requirements in light of the limited nature of the employer's privacy interest in the portions of his premises routinely occupied by his employees." Brief for the Appellants, 19. Before the Secretary's position in this respect is analysed, the nature of the employers' privacy interest in these circumstances should be considered.

#### A. *The Nature of the Privacy Interests Protected:*

Insight into the nature of these privacy interests protected by warrant procedures is to be gained by reference to the history of the Fourth Amendment. As stated by this Court in *Warden vs. Hayden*, 387 U.S. 294, 301 (1967), "we have examined on many occasions the history and purposes of the amendment. It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,' *Boyd vs. U.S.*, 116 U.S. 616, 630, 29 L.Ed. 746, 751, 6 S.Ct. 524, from searches under indiscriminate, general authority." That this historical evaluation continues was recently noted in *U.S. vs. Chadwick*, 45 U.S.L.W. 4797, 4799 (U.S. June 21, 1977), where the Court reaffirmed that "it cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of as-

sistance . . . (which) granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." The uniqueness of the Fourth Amendment in the history of American constitutional development has been succinctly set forth in a work frequently referred to by this Court:

"Guarantees such as trial by jury, the privilege against forced incrimination, and that against double jeopardy were hallowed by the centuries; as part of the common law of England they became as firmly established in the American Colonies as in the mother country itself. To understand why they were sufficiently prized to be placed in the Constitution, one must study English, rather than American, history. Such, however, is not the case with the Fourth Amendment. Alone among those constitutional provisions which set standards of fair conduct for the apprehension and trial of accused persons, the Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.

\* \* \*

"The Fourth Amendment was not a construct based on abstract considerations of political theory, but was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of high-handed search measures which Americans, as well as the people of England, had recently experienced. These abuses, which in the

American Colonies took place largely in the fifteen years before the American Revolution and which extended over a much longer period of time in England, had done violence to the ancient maxim that 'a man's home is his castle.' It was to guard against a repetition of these experiences that six of the newly independent states almost immediately wrote into their own constitutions provisions akin to those of the Fourth Amendment. The antecedent history of the Fourth Amendment, therefore, has two principal sources; the English and American experiences of virtually unrestrained and judicially unsupervised searches, and the action that had already been taken by some of the states to guard constitutionally against a recurrence of this abuse. From these tributaries flowed the Fourth Amendment."<sup>14</sup>

It is precisely because of the threat of recurrence on a massive scale of such high-handed, judicially unsupervised search measures in the present day that the history of the Fourth Amendment as the national remedy to, and safeguard against, unwarranted governmental intrusion must be carefully reviewed. As noted above, this Court has indicated its frequent review of, and its intimate familiarity with, the development of this history. Nevertheless, some comments might be in order. At the outset, it is clear that the protections of the Fourth Amendment are anti-governmental; i.e., they protect against governmental, as opposed to private, intrusions.<sup>15</sup> As stated by this Court

<sup>14</sup>Landynski, *SEARCH AND SEIZURE AND THE SUPREME COURT*, the John Hopkins Press, 1966, 19-20 (hereinafter referred to as "Landynski"). This work has been referred to in many of this Court's cases and most recently in *G. M. Leasing Corp. vs. U.S.*, 429 U.S. 338, 355 n. 19 (1977).  
<sup>15</sup>History makes it clear that the searches to be controlled were those to be carried out under public authority in the name of the law, and not

in *Camara vs. Municipal Ct.*, 387 U.S. 523, 528, "The basic purpose of this amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."

Next, it is proper to be reminded that, although the Fourth Amendment was drafted by the first Congress and followed a legislative precedent set by the Virginia Bill of Rights of 1776,<sup>16</sup> it was a *judicial* doctrine, fought for and preserved almost single-handedly by the American colonial judges.<sup>17</sup> The eloquence of James Otis, Jr., in his argument in opposition to the petition of T. Lechmere in 1761 as recorded by John Adams, has become well known<sup>18</sup> and has often been improperly cited as evidence for popular discontent against writs of assistance.<sup>19</sup> In fact, the battle against the writs of assistance as general warrants was not of a popular nature, but rather of an unheralded, but intense, legal confrontation between American judges and the English executive throughout the Colonies.<sup>20</sup> As pointed

those made by private persons not acting under the color of law. Landynski, 44.

<sup>16</sup>Landynski, 37-42; THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, John Hopkins University Studies in Historical and Political Science, Series 55, No. 2, 1937, 79; See, generally, *The Bill of Rights, A Documentary History*, B. Schwartz, Ed., 1971.

<sup>17</sup>O. M. Dickerson, "Writs of Assistance as a Cause of the Revolution," in THE ERA OF THE AMERICAN REVOLUTION, Richard B. Morris, Ed. 1939 (First Harper Torchbook Ed., 1965) 40-75 (hereinafter referred to as "Dickerson, 'Writs of Assistance'"). This essay by O. M. Dickerson, referred to as "an able study" by Landynski, p. 31, footnote 51, and p. 36, footnote 84, more than any other reviewed, accurately describes the facts underlying the American concern with general warrants and the necessity of a separate judiciary.

<sup>18</sup>Adams, *Life and Works of John Adams*, Vol. X, 276.

<sup>19</sup>Dickerson, "Writs of Assistance." See, also Landynski, 36.

<sup>20</sup>Dickerson, "Writs of Assistance", 47-49. O. M. Dickerson provides us at 73-75 with a memorable summary of this confrontation, which has particular application in the present case in light of the Secretary's position that judicial supervision should be excluded from OSHA administrative searches:

"It took courage for judges to refuse writs of assistance when demand-

out by O. M. Dickerson," the lawyers and judges in the American Colonies were familiar solely with the practices of the courts of the common law. Search warrants were issued in the common law courts only on specific information, supported by oath or affirmation, and returnable to the court of issue. Therefore, when American judges and lawyers were confronted with a form for a writ of a general nature prepared by the customs officers and as used by the Exchequer Court in England, they could not avoid the conclusion that this was a new device of the executive and entirely unsupported by law.

This history establishes the fact that the provisions

ed by the customs officers, since they held their commissions at the will of the Crown and were dependent for their salaries upon the revenues collected by the custom commissioners. Detailed reports were required of the custom officers as to the success of every application to a court or to a judge for writs. In no other case were courts watched so narrowly. Abstracts of court records were demanded and received. Private conversation was recorded at once in writing. Thus every attorney general and every judge knew that his rulings and opinions would be reported directly to the customs commissioners. They must also have known that any reported failure on their part to cooperate with customs officers would be transmitted to England. They faced the possibility that they might at any time be deprived of their positions by royal order and have their pay reduced or stopped entirely. They must have also known that compliance on their part might be rewarded by preferment and possibly by increases in salary. It does not seem improbable that such possibilities were presented to them orally, although no written records verifying this assumption have come to light. In the face of such formidable pressure from official sources, it is surprising that the judiciary from Connecticut to Florida, with one exception, stood firm in opposing the legality of the particular form of writ demanded of them and continued in their judicial obstinacy through six years of nearly constant efforts to force them to yield.

"... The evidence indicates that the outbreak of the Revolutionary War alone averted efforts to secure judicial changes that would have forced American judges to comply with the official British interpretation of law. The efforts to overrule the judges in Virginia have already been commented upon. The persistence and tenacity with which the commissioners of customs pursued their campaign for general writs indicate their determination to see the matter through, even though it required changes in the judicial system. In this they were not acting on their own initiative, but were under constant pressure from England. The American determination to keep the courts free from executive control rose in no small degree out of this experience."

<sup>21</sup>*Ibid.*, 47-48.

of the Fourth Amendment are directed against the government, more particularly the executive; that they are directed against unreasonable intrusion by the government; that these provisions have been judicially developed and fashioned; and that these provisions are precedural safeguards for determining the reasonableness of a search which requires judicial supervision. The warrant procedure is a judicial institution to check the executive.

Our history teaches us that the instrument of this intrusion, the general warrant which became synonymous with the writ of assistance in the Colonies,<sup>22</sup> was applied principally to suppress the smuggling that resulted from the enforcement of the mercantile system in 1760 following the French and Indian Wars.<sup>23</sup> Since the smuggling was not by any means confined to homes, the writs of assistance were the instruments of intrusion into all sorts of houses, buildings and containers. The acts of 1664, 13 and 14 Car. II, C. 11, Cl. 5, were made applicable to the Colonies through the Act of 1696, 7 and 8 Wm. III, authorizing any person with a writ of assistance "in the daytime to enter, and go into any house, shop, cellar, warehouse, room, or other place . . ."<sup>24</sup> The authority vested in customs officials was expressly stated in their commissions, which empowered them, with writs of assistance, to "enter into any house, shop, cellar, warehouse or other place whatsoever not only within said port but within any other port or places within our jurisdiction there to make diligent search . . ."<sup>25</sup>

<sup>22</sup>Landynski, 30-32; Dickerson, "Writs of Assistance", 43-47.

<sup>23</sup>Landynski, 30.

<sup>24</sup>Dickerson, "Writs of Assistance", 44.

<sup>25</sup>Dickerson, "Writs of Assistance", 45; e.g., the writ of assistance issued

As the procedural safeguard expressly developed against governmental intrusion, the Fourth Amendment necessarily afforded a scope of protection as broad as the scope of the abuse inflicted by the writs of assistance. Hence, our history clearly demonstrates that the Fourth Amendment is not confined to protecting privacy interests in homes, but extends to all "houses", warehouses, buildings, shops, cellars, rooms and other places. *U.S. vs. Chadwick*, 45 U.S.L.W. at 4799. Commercial houses and places of trade were obviously primarily contemplated in this context, since the surreptitious commercial trade or smuggling of the colonists was the principal target of writs of assistance.<sup>26</sup> Therefore, proper historical interpretation of the Fourth Amendment inescapably leads to the conclusion that privacy interests in the context of private enterprises, private property, private domain, business, and commerce, as well as privacies of the home, are protected by its provisions. *U.S. vs. Chadwick*, *supra* at 4799, 4800.

Despite this historical record, the Secretary takes the position that this Court's decisions in *Camara* and *See* do not control in this case. Brief for the Appellants, 14, 22-33. The Secretary seeks to limit the holding in these cases to certain narrow factual aspects found in each. Since *Camara* involved the attempted search of a

to Charles Paxton, surveyor of the Port of Boston, on December 2, 1761, against the issuance of which James Otis had argued, was equally broad and authorized him to enter "into any house, shop, cellar, warehouse or room or other place" in search of prohibited goods. See *Documentary Sources Book of American History, 1606-1826*, edited by William McDonald, 1926, 105-108, for the full text.

<sup>26</sup>Although Barlow's agrees with the Court's reasoning in *U.S. vs. Chadwick*, *supra* at 4799, that "it would be a mistake to conclude, as the government contends, that the warrant clause was therefore intended to guard only against intrusions into the home," it is submitted that the essay of O. M. Dickerson, referred to above, overcomes the "silence in the historical records" referred to by the Court.

personal residence, the Secretary claims that holding to be limited to protecting "a core privacy interest" confined to the privacies of a dwelling. Brief for the Appellants, 14, 32. Likewise, the Secretary claims that this Court's holding in *See*, involving a commercial warehouse, should be limited to these factual aspects: "[T]he warehouse . . . (was) maintained as locked premises and . . . (was) inaccessible to anyone except the defendant' (408 P. 2d at 263)." Brief for the Appellants, 14, 32.

Barlow's submits that the constitutional protections forged on the anvil of American history include privacy interests associated with private property and domain and are not limited to the "core interests" of home and office as contended by the Secretary. The historical record compels the conclusion that the "governing principle" of *Camara* as applied in *See* supports the general application of the holding in the latter that "the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See vs. City of Seattle*, 387 U.S. at 543. In other words, the legitimate privacy interests of the businessman include the expectation that all of his private commercial property shall be free from warrantless government intrusion.

A careful reading of the decision in *See* makes manifest this Court's intent to rule on the broad issue of whether the holding in *Camara* applies generally to warrantless official entries upon private commercial property. Following a discussion of the rapid growth of governmental regulation and the regulation technique of official entry on commercial property, the

Court noted that it "has not had occasion to consider the Fourth Amendment's relation to this broad range of investigations" 387 U.S. at 554. Referring to the comprehensive variety of fact situations in the considerable number of cases dealing with the Fourth Amendment issues raised by the administrative subpoena of corporate books and records, the Court found "strong support in these subpoena cases for our conclusion that warrants are a necessary and tolerable limitation on the right to enter upon and inspect commercial premises." 387 U.S. at 544. Equally comprehensively, the Court held:

"We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.

"We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—is applicable in this context, as in others, to business as well as to residential premises." (Emphasis supplied)<sup>27</sup>

In *U.S. vs. Chadwick, supra*, this Court criticized the government's "core interest" approach in its contention that "the Fourth Amendment warrant clause protects only interests traditionally identified with the 'home' and 'other specifically designated locales'". 45 U.S.L.W. 4798, 4799. It would appear that the Secre-

<sup>27</sup>*See vs. City of Seattle*, 387 U.S. 545, 546. The "case by case" consideration proposed by the Court was limited to the issue of determining exceptions to the general commercial rule in instances of licensed or heavily regulated businesses. *Id.* at 546.

tary attempts to limit privacy interests to a "core" interest based on the concept of personal privacy or solitude. According to the Secretary, an employer's only legitimate expectation of privacy is limited to "his home, office or person." Brief for the Appellants, 31. As indicated above, the historical development of the Fourth Amendment and this Court's cases clearly indicate that a most comprehensive variety of privacy interests are protected from governmental intrusion by the safeguards of the Fourth Amendment. Clearly, legitimate expectations of privacy, in the sense of protected privacy interests, include those interests related to the use and enjoyment of "private" property in circumstances not necessarily restricted to solitude. *Accord, G.M. Leasing Corp. vs. U.S.*, 429 U.S. 338, 352-359 (1977), reaffirming and applying in a commercial, corporate context the holding of *Camara* that "except in certain carefully defined classes of cases" the privacy interests in private property must be safeguarded against governmental intrusion by a valid search warrant procedure.

The Secretary's application of a "limited privacy interest" theory to this case is not helped by reference to the authority of automobile search cases. This Court's recent decision in *South Dakota vs. Opperman*, 428 U.S. 364 (1976), sets forth a 'well settled,' "two fold" distinction between the search of an automobile and the search of a home or office:

"First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible . . . beside the element of

mobility . . . the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office . . . automobiles, unlike homes, are subject to pervasive and continuing government regulations and controls, including periodic inspection and licensing requirements." 428 U.S. at 368.

The distinction between automobile searches and administrative searches for health and safety reasons, such as those involved in *Camara* and *See*, were readily distinguished by the Court. 428 U.S. at 467, n. 2.

Of paramount importance is the fact that in no case involving the search of a private premises has this Court recognized existence of a "limited privacy interest" that has been outweighed in the balance by governmental interest to inspect. The application of the "reasonable expectation of privacy" doctrine developed in *Katz vs. U.S.*, 389 U.S. 347 (1967), served to expand the scope of Fourth Amendment protections available to privacy interests rather than to contract them as the government's balancing theory would do. Accordingly, this Court in *Katz* expressly disapproved of the physical trespass theory of governmental intrusion relied upon in *Olmstead vs. U.S.*, 277 U.S. 438 (1928), and its progeny and extended the need for judicial supervision of the scope of a search to "wherever a man may be." *Katz vs. U.S.*, 389 U.S. at 359.

Likewise, the doctrine of the *Katz* case refutes the Secretary's contention that Barlow's privacy interests in the enclosed, non-public work areas of its premises is "effectively diminished" by the "routine occupation by the owner's employees and infrequent visits by

those outside parties who deliver materials for the conduct of the enterprise . . .—especially *vis a vis* inspectors whose mission is to ensure the health and safety of the very employees whom the owner has assigned for his profit to the areas at issue.” Brief for the Appellants, 29. The Secretary claims that Barlow’s “privacy” (as distinguished from “privacy interests”) is diminished by the presence of the work force on the premises. In language applicable to the Secretary’s contention, this Court in *Katz* declared:

“We decline to adopt this formulation of issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area.’ Secondly, the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ *That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.* Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states.” (Emphasis supplied)

\* \* \*

“[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. (cases cited) But what he seeks to preserve as private, even in an area

accessible to the public, may be constitutionally protected. (cases cited)” *Katz vs. U.S.*, 389 U.S. at 350-352.

Hence, the Secretary’s reliance on “privacy,” in the sense of personal privacy, solitude or confidentiality (as distinguished from “privacy interests”) as a criterion for invoking the Fourth Amendment protections is faulty. The term “privacy interests” (also referred to as “privacy” in many decisions, e.g. *Chadwick*, *supra* at 4799, 4800) is not descriptive of any type or degree of personal privacy in the sense of solitude, confidentiality or the right to be let alone. But rather it is descriptive of the right of the people to be secure from unreasonable governmental intrusion and in the exercise of the safeguards of the Fourth Amendment. These privacy interests must always be set in the context of individual or corporate rights; i.e., personal privacy, property rights, and such, in order to have meaning.” The protection of these privacy interests was again very recently affirmed in the *Chadwick* case:

“[These cases] also reflect this settled constitutional principle, discussed earlier, that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not

<sup>20</sup> “[I]t is plain that to a large extent one’s important interests—the elements of one’s legal identity—are created or defined by the state, through its property, contract, or agency law. Attempts to define ‘privacy’ without reference to such terms have not been successful in any of the situations in which that has been attempted. It may be that privacy, like happiness, cannot be talked about directly but only through the use of other, subsidiary, languages.” James B. White, *The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock*, in *THE SUPREME COURT REVIEW*, 218 (Philip B. Kurland, ed. 1974).

simply those interests found inside the four walls of the home." *U.S. vs. Chadwick*, *supra* at 4800.

As applied to Barlow's, then, the fact that employees are present in the enclosed work areas of the business premises is irrelevant. Obviously, there is less personal privacy extant under such circumstances. Significantly, however, Barlow's work area is *non-public*, and, as such, Barlow's has a legitimate privacy interest to be protected against warrantless, governmental intrusion in those enclosed work areas. *Camara*, 387 U.S. at 529-530; and *See vs. City of Seattle*, 387 U.S. at 543.

Likewise, the doctrine of relinquishment of privacy interests discussed in *Marsh vs. Alabama*, 326 U.S. 501 (1945), is inapposite. The Secretary and the *amicus* A.F.L.-C.I.O. contend that by opening its business premises to employees, Barlow's relinquishes its privacy interests in the Fourth Amendment safeguards. Brief for the Appellants, 29-30; and Brief for the A.F.L.-C.I.O., as *amicus curiae*, 10-12. The fact situation in the *Marsh* case can be readily distinguished from that in *Barlow's* in that the company-owned town in *Marsh* assumed many public community functions, thereby acquiring sufficient duties to the public to cause it to be subjected to public control. 326 U.S. at 502. Barlow's has taken on no public functions of the sort spoken to in *Marsh*. Neither the Secretary nor the A.F.L.-C.I.O. present any authority sustaining their theory that the mere presence of employees regularly engaged on the premises in the employ of the owner constitutes such a relinquishment of control as was evident in *Marsh*. Furthermore, and perhaps most significantly, the constitutional issue in *Marsh* dealt with

First Amendment rights and the body of law thereappertaining. The analogy drawn by the A.F.L.-C.I.O. between Barlow's work areas and common areas of residential rental properties is also inapposite, because Barlow's employees have nothing approaching a leasehold interest in any way related to Barlow's premises.

The Secretary does not contend that the business premises of Barlow's are not protected by the Fourth Amendment for the reason that Barlow's is a corporation. Such a proposition could not be defended in light of this Court's clear holdings to the contrary. *G. M. Leasing Corp. vs. U.S.*, 429 U.S. 338 (1977); *See vs. City of Seattle*, 387 U.S. 541 (1967); *Oklahoma Press Publish. Co. vs. Walling*, 327 U.S. 186, 205-206 (1946); *Go-Bart Co. vs. U.S.*, 282 U.S. 334 (1931); *Silverthorne Lmbr. Co. vs. U.S.*, 251 U.S. 385 (1920); and *Hale vs. Henkel*, 201 U.S. 43, 75-76 (1906). *Cf.*, *Cal. Bankers Assn. vs. Schultz*, 416 U.S. 21 (1974).

In summary, the history of the Fourth Amendment and the decisions of this Court interpreting that history establish that the privacy interests protected by the Fourth Amendment include the right of corporations to maintain their commercial, non-public work areas free of unwarranted governmental intrusion, except in certain carefully defined classes of cases. The Secretary to the contrary, this Court has not recognized any "limited" privacy interest as applied to private premises inspections. The privacy interest exists, as such, and is protected by the safeguards of the Fourth Amendment. This Court has not viewed these privacy interests as being diminished, lessened or limited by reasonable search based on a valid warrant or by warrantless searches made under exigent cir-

cumstances or in other certain carefully defined classes of cases. *Camara vs. Municipal Ct.*, 387 U.S. at 528-529, 533.

*B. Governmental Interests in Effectuation of the Purposes of OSHA Do Not Justify the Creation of a Broad New Area of Administrative Inspection Activity Free of Fourth Amendment Warrant Requirements.*

The Secretary has developed his argument for warrantless OSHA inspections in the context of balancing a "limited" or "diminished" privacy interest in the employer against the convenience of the inspection procedures and the governmental interest in conducting the inspections. Brief for the Appellants, 26-31. Although, as shown above, a concept of "limited" privacy interest is inapplicable in this case and the balancing theory proposal by the Secretary has been rejected by this Court, the government's interest and the inspection procedures must be considered in order to determine whether warrantless OSHA inspections are reasonable in the context of this Court's holdings in *Colonnade Catering Corp. vs. U.S.*, 379 U.S. 72 (1970), and *U.S. vs. Biswell*, 406 U.S. 311 (1972).

The absolute privacy interests safeguarded by the Fourth Amendment are, by its terms, subject to reasonable governmental search. As explained in *Camara*, the question is not a matter of balancing these privacy interests against the interests of the government to search, rather it is a question of the reasonableness of the search. *Camara* reaffirmed the "governing principle" that, except for a carefully defined class of cases, all such searches into privacy interests are "unreasonable" unless authorized by search warrant. 387 U.S.

at 529, 530. The issue here, then, is not whether there is probable cause to issue a search warrant, but whether OSHA inspections can be conducted without search warrants. In determining whether OSHA inspections fall into the narrow class of cases excepted from the warrant requirement, we are advised by *Camara* that the question is whether the burden of obtaining a warrant is likely to frustrate the government's purpose behind the search. It is submitted that this Court has decided that the only relevant civil purposes recognized as not subject to such material frustration by the warrant procedure are those described in *Colonnade* and *Biswell* as delimited by the decisions of *Almeida-Sanchez* and *Western Alfalfa*: those associated with licensing and pervasive regulation by government.

In *Colonnade* the Court considered the issue of the constitutionality of a statute providing for warrantless inspections of federally licensed dealers in alcoholic beverages. With reference to its decision in *See* that it had "reserved a decision on the problems of licensing programs requiring inspection," 379 U.S. at 77, the Court allowed warrantless inspections because of the long history of government licensing and pervasive regulation of liquor traffic. In *Biswell* the Court dealt with the issue of the warrantless inspection of a federally licensed firearms dealer. Following the rationale in *Colonnade*, the Court held the rationale requiring warrants in *See* inapplicable, finding that "when a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection." 406 U.S. at 316.

This Court has on two subsequent occasions construed its holdings in *Colonnade* and *Biswell* and found the exceptions to the rule in *Camara* and *See* to be limited to governmentally licensed and pervasively regulated enterprises. In *Almeida-Sanchez vs. U.S.*, 413 U.S. 266 (1977), the Court faced the issue of whether the border patrol could search the petitioner's car without a warrant. The government took the position that the search was an administrative inspection conducted pursuant to a valid statute, and therefore did not require a warrant. In rejecting the applicability of *Colonnade* and *Biswell*, the Court stated:

"Two other administrative inspection cases relied upon by the government are equally inapposite. (*Colonnade* and *Biswell*) Both approved warrantless inspections of commercial enterprises engaged in business closely regulated and licensed by government.

\* \* \*

"A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in *Biswell*:

"It is also plain that inspections for compliance with the gun control act pose only limited threats to the dealers' justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license,

he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task.' *United States vs. Biswell. Id.*, at 316." 413 U.S. at 270, 271.

Very recently in *G.M. Leasing Corp. vs. U.S.*, 429 U.S. 338 (1977), this Court rejected the contention of the I.R.S. that its power to lay and collect taxes constituted a broad exception to the Fourth Amendment safeguards against warrantless intrusion. The I.R.S. claimed that its vast tax collection effort subjected all businesses to its regulation thereby justifying warrantless searches on the rationale of *Biswell*. The Court rejected this argument:

"The respondents argue that warrantless searches are justified by congressional enactment, as were the searches in *Biswell* and *Colonnade*." 429 U.S. at 356.

\* \* \*

"The respondents argue that the interest in the collection of taxes is such as to bring this case within the reasoning of *Biswell* and *Colonnade*. Those cases involved a voluntary participation in a highly regulated activity." (Emphasis supplied) 429 U.S. at 357.

"In the present case, however, the intrusion into petitioner's privacy was not based on the nature of

its business, its license, or any regulation of its activities." (Emphasis Supplied) 429 U.S. at 358.

• • •

"The intrusion into petitioner's office is therefore governed by the normal Fourth Amendment rule that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' *Camara v. Municipal Ct.*, 387 U.S. at 528-529." 429 U.S. at 358.

As is the case with the great majority of approximately five million businesses with their sixty million employees,<sup>29</sup> Barlow's is not licensed by the federal government, nor does it do any business in any pervasively regulated industry or enterprise. By footnote, the Secretary seeks to demonstrate that the need for the Act supports the government's interest in a warrantless inspection program by setting forth a number of disconnected statistics from the Senate hearings on the Act. Brief for the Appellants, 4-5, n. 2.<sup>30</sup> Reflecting OSHA's vast jurisdiction, these statistics are so general as to be almost meaningless in application to

<sup>29</sup>Robbins, *Truth and Rumor About OSHA*, 33 *FED.B.J.* 149, (1974); the Department of Labor defines small businesses as twenty-five or fewer employees. Of the approximately five million established businesses, 4.5 million are small businesses in this definition. *OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION'S IMPACT ON SMALL BUSINESS*, OSHA Office of Policy Analysis, U.S. Department of Labor, July, 1976; see, also, comment "OSHA vs. the Fourth Amendment: Should Search Warrants be Required for 'Spot Check' Inspection?", 29 *BAYLOR LAW REVIEW* 283, 1977; comment, "Due Process and Employee Safety" *Conflict in OSHA Enforcement Procedures*, *YALE LAW JOURNAL*, 1380, 1975.

<sup>30</sup>In addition to being suspect on their face, these statistics, as well as others marshaled to support the legislation in Congress have been extensively criticized as inaccurate and misleading as well as failing to demonstrate the efficacy of the Act. See generally, Robert Stewart Smith, *THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS* (1976); and Tim Engel, *OSHA: AN OVERVIEW* (1977).

the regulation of the operation of any particular business or type of businesses.<sup>31</sup> There can be no argument that the goals of Congress in securing the health and safety of American employees are highly laudable. However, these general factual findings by Congress regarding the vast field of private business gave birth to OSHA and resulted in each employer being faced with the overwhelming legal presumption of his knowledge of over 4,400 OSHA standards covering 800 pages in the Code of Federal Regulations—with 2,100 of these standards applying to all industries and the remainder to construction and maritime industries.<sup>32</sup> The general application of these OSHA standards further underscores the lack of genuine pervasive regulation by OSHA. There is very little in these regulations which applies or is related to the particular nature, problems, operation or activities of specific businesses or of types of businesses. Of persuasive application here is this Court's language in rejecting the claim of the I.R.S. to pervasive regulation that "the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities." *G.M. Leasing Corp. vs. U.S.*, 429 U.S. 338, 354.

<sup>31</sup>The basic problem with the implementation of the Act is that there is no fundamental agreement either on the Act's goals or on the practical methods of balancing considerations of greater safety and health against considerations of cost. Worse yet, there is no agreement among policy makers or lobbyists even on the framework that should be used for the discussion of these issues—primarily because safety and health are generally regarded as "goods" of inestimable, if not infinite, value. Robert Stewart Smith, *THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS*, 1976, 1. This study by Smith argues that the safety and health mandate of OSHA is inconsistent with the goal of promoting the general welfare. The study also demonstrates that the current program is likely to be ineffective in reducing injuries. See also, *Benefits and Costs of the Occupational Safety and Health Acts A Review of the Available Evidence*, Cong. Research Serv., Lib. of Cong. 1977, 17-19.

<sup>32</sup>Robert Stewart Smith, *THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS*, 1966, 11.

The breadth of the Act, the general application of its standards, and its provisions for specific enforcement create a great potential for serious abuse—a situation that cries out for strict application of the Fourth Amendment safeguards provided by valid search warrants issued by an independent judicial officer upon a showing of probable cause. We are reminded of Judge Gee's words in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154, 161 (1976), "OSHA's sweep is broad, and Congress' findings supporting it are slender . . ." As pointed out by Judge Gee, the findings of Congress supporting OSHA may be contrasted with such detailed and specific findings as preface the Mine Safety Act, in which context warrantless inspections were upheld in *Youghioghny & Ohio Coal Co. vs. Morton*, 364 F.Supp. 45 (1973). In *Youghioghny* the Court recognized the basic rule of *Camara* and *See* and carefully adopted the exception accorded to pervasively regulated industries set out in *Colonnade* and *Biswell* and delimited in *Almeida-Sanchez*. The term "pervasively regulated" is not synonymous with being subject to "many" regulations. As the foregoing decisions show, "pervasive regulation" refers to the specific nature of a business or type of industry. The lack of pervasive regulation and the broad, general terms of the Utah OSHA Act have been heavily criticized by Judge Croft in *R. Lamar Baird vs. Utah*, Civil No. 237878 (3rd Dist. Utah, January 9, 1977), CCH OSHD § 21,523:

"A 'workplace' is any place of employment (section 35-9-3(9)) and an 'employer' is any governmental entity, or company, or any person having one or more workmen or operatives regularly employed in

the same business under any contract for hire (section 35-9-3(5)). The breadth of these definitions and the possibilities of unannounced, uninvited and compelled intrusions into the lives of all concerned staggers the imagination."

The Secretary and the *amicus* A.F.L.-C.I.O. take out of context the word "any" in a statement from *G. M. Leasing Corp.* in asserting that the doctrine of *Biswell* and *Colonnade* controls for the reason that an OSHA inspection of an employer's premises is "based on the nature of its business, its license or *any* regulation of its activities." (Emphasis supplied) As brought out above, the *G. M. Leasing Corp.* and *Almeida-Sanchez* cases clearly delimit the application of the Fourth Amendment exceptions allowed in *Colonnade* and *Biswell* to licensed and heavily regulated businesses where the licensing and regulation are directed to the nature of the business or industry, its activities, operation and problems. Reasoning by analogy cannot be stretched so far as to support the Secretary's contention that a general regulatory law such as OSHA, concerned with the health and safety of the nation's employees in their workplaces everywhere constitutes "pervasive" regulation of any particular business or place of employment as contemplated in *Biswell*.

If the legislative history of OSHA and its resultant statutory and regulatory provisions do not provide for a scheme of pervasive regulation of the businesses under its jurisdiction, then by what exception to the rule in *Camara* and *See* can the Secretary justify his claim of authorization for warrantless inspections? One of the exceptions reaffirmed in *Camara* was the

authorization of warrantless inspections in "emergency situations." 387 U.S. at 539. However, there is nothing in OSHA to indicate that its enforcement is based on such emergency or "exigent" circumstances. In *G. M. Leasing Corp.* the I.R.S. claimed that the imposition of warrant procedures on its tax levying authority would be an intolerable burden, for the reason that much of the property subject to seizure is removable. The Court rejected this argument and stated:

"The statute simply does not focus on situations involving a need for rapid action . . . and we are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring *per se* exempt from the warrant requirement every intrusion into privacy made in the furtherance of any tax seizure." 429 U.S. 338, 357-358.

OSHA by its own provisions recognizes that its routine spot inspections do not constitute emergency or "exigent" circumstances. Such circumstances of "imminent dangers" to safety and health are particularly defined and subjected to procedures distinct from the routine random or "general schedule" investigation. 29 USC § 662.<sup>33</sup> Hence, the provisions of Section 8(a) of the Act simply do not focus on emergency situations.

Likewise, administrative efficiency or "inconvenience

<sup>33</sup>Imminent dangers" are defined as "any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter." 29 U.S.C. § 662(a). It is interesting to note that under such emergency situations the statute provides for judicial involvement in the form of injunctive relief and restraining orders against imminent dangers. *Id.*, § 662(a) & (d). Also to be noted is the provision by regulation for an exception to the prohibition against giving advance notice of inspection in cases of "apparent imminent danger." 29 C.F.R. 1903.6.

alone has never been thought to be an adequate reason for abrogating the warrant requirement." *Almeida-Sanchez vs. U.S.*, *supra* (Powell, J., concurring at 283). Hence, warrantless inspections should not be allowed on the Secretary's claim for need of rapid action or surprise "in view of the ease in which hazardous working conditions might be temporarily concealed or ameliorated." Brief for the Appellants, 20. The need of the government to inspect in order to insure the efficacy of its programs has never been found to be a controlling factor by this Court. *Camara*, 387 U.S. at 533; *G. M. Leasing Corp.*, 429 U.S. at 354-356; *Almeida-Sanchez*, 413 U.S. at 273.

The Secretary and several *amici* contend that the statutory and procedural safeguards of the Act limit the possibilities of abuse of employer's privacy interests to such a degree that individualized, independent judicial supervision is no longer necessary for the routine OSHA inspection. Brief for Appellants, 34-37. This astounding proposition ignores the classic Platonic question: Who will regulate the regulators, The statutory provisions limiting inspections to "regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner" and so on, are not self-applying—but involve the conduct of and interpretation by inspectors. To this the Secretary answers that the discretionary decisions made in the application of the statutory inspection provisions to a particular business are made by the area supervisors, thereby abrogating any function for a magistrate to perform in an OSHA inspection. Brief for the Appellants, 35, 44-45. Obviously, such provision does not meet the standards of the Fourth Amendment for in-

dependent judicial supervision over entry into private premises. Of particular application to the Secretary's position in this regard is Justice Jackson's statement:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson vs. U.S.*, 333 U.S. 10, 13-14 (1948).

Likewise, this same proposition was answered in *Camara*:

". . . Broad statutory safeguards are no substitute for individualized review." 387 U.S. at 533.

The fundamental importance of judicial supervision over official intrusion into privacy interests was reaffirmed by Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez*, 413 U.S. at 280:

"I expressed the view last term that the warrant clause reflects an important policy determination: 'The Fourth Amendment does not contemplate the executive officers of government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.' (cases cited)"

A few examples serve to refute the remainder of the government's arguments that the safeguards in the statute are sufficient to protect the Fourth Amendment privacy interests. For example, the Secretary characterizes an OSHA inspection as "carefully limited in . . . scope" (Brief for the Appellants, 33). This contention is belied even by events related to the instant case. Pursuant to the Secretary's motion to compel compliance, the Idaho district court entered an order authorizing the Secretary to enter upon the premises of Barlow's, Inc., and to conduct an inspection and investigation:

"[T]hat shall extend to the establishment or other area, workplace or environment where work is performed by employees of the employer, Barlow's, Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials and all other things therein (including, but not limited to, records, files, papers, processes, controls and facilities) bearing upon whether Barlow's, Inc., is furnishing to its employees employment and a place of employment that are free from recognized hazards . . ." Record, Complaint Exhibit A (copy attached hereto as Exhibit A).

The similarity of the foregoing language to that contained in the writs of assistance is noteworthy. Note should also be taken of the considerable discretion the inspector would necessarily be required to exercise in determining what items had "bearing" upon whether Barlow's, Inc., was furnishing its employees with a proper place of employment—and, for that matter, determining what constituted a proper place of em-

ployment. While authorization for this inspection was obtained through a form of judicial review, the broad scope of the order and the discretion vested in the inspector clearly demonstrate that such inspections without independent judicial supervision would, indeed, constitute modern versions of writs of assistance envisioned by the Court in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154, 162, (1967).

Furthermore, it must be borne in mind that OSHA's inspection function has been preempted in many instances by other regulatory agencies.<sup>34</sup> Judicial supervision on this issue of jurisdiction might have prevented OSHA's numerous attempts to enforce inspections against employers who are regulated by other agencies.<sup>35</sup> Of course, the most critical need for independent judicial review of OSHA inspections is to prevent the harassment of individual employers.<sup>36</sup>

The Secretary also contends that the imposition of a warrant requirement upon non-consensual inspections would impede the effectiveness of OSHA and thereby frustrate the intent of Congress. Brief for the Appellants, 37-38. Warrant requirements would, according to the Secretary, place an intolerable burden on limited judicial and enforcement resources, creating severe delays in implementing inspections and destroy-

<sup>34</sup> § 4(b) (1) of the Act, 29 U.S.C. § 653(b) (1).

<sup>35</sup> See, e.g. *Newport News Shipbuilding and Drydock Co.*, OSHID § 19, 160 (1947) dealing with the Atomic Energy Commission; *N.W. Orient Airlines, Inc.*, OSHD § 21, 225 (1976) dealing with the Federal Aviation Commission.

<sup>36</sup> E.g., *Weyerhaeuser Co. vs. Maurice S. Reizen, et al*, No. 7-71052 (E.D. Mich., June 7, 1977), where the employer was inspected seven times with respect to the same noise standard in a short period of time and acquitted on each occasion; *Dunlop vs. Hertzler Ent., Inc.*, 418 F.Supp. 627 (1976), where inspectors attempted to inspect the employer's home because some of his employees kept their lunches in his home refrigerator.

ing the element of surprise which is essential to the enforcement of the statute. For example, throughout, the Secretary has constantly presented the spectre of employers who "often" conceal hazardous working conditions or otherwise intentionally attempt to evade the law. Brief for the Appellants, 12, 20, 22, 37-39. This argument is refuted by the provisions of the Act itself and actual experience. Despite the possibilities for intentional violation of the Act claimed by the Secretary, he admits that "since the Act's April 1, 1971, effective date, approximately 400,000 inspections have resulted in only five criminal prosecutions." Brief for the Appellants, 7, n. 3. Moreover, under current agency regulations, the Secretary's only course upon entry refusal is to obtain a court order mandating entry. 29 C.F.R. § 1903.4.<sup>37</sup> Judicial notice could be taken by this Court that almost any warrant procedure would be less cumbersome and less time-consuming than the contested hearings in federal court which result from the compulsory process currently utilized by the Secretary. Note should also be taken that one court, in denying a motion for an order compelling inspection, held that a showing of probable cause is required for issuance of an inspection order. *Empire Steel Mfg. Co. vs. Marshall*, Civil No. 77-48-BLG (D. Mont., Sept. 1, 1977) 15. In requesting inspection orders, which require notice of hearing and time of inspection, it would seem that the Secretary might be in violation of his own arguments for secrecy, if not of Section 29 USC 666 (f) prohibiting advance notice. Furthermore, since the procedure for obtaining a search warrant is an *ex parte*

<sup>37</sup> Refusal to permit entry if construed in any fact situation to involve forcible resistance or opposition subjects one to criminal liability. 29 U.S.C. § 666(a) and (h); and 18 U.S.C. §§ 111, 1114.

proceeding, there is every reason to believe that in the great majority of instances the integrity of the Secretary's desired secrecy would be maintained. In cases of entry refusal, the Secretary could simply reschedule such inspections for a later time and obtain an *ex parte* inspection warrant immediately prior thereto. Obviously, after a certain amount of time, surprise would once again be achievable in each case. Hence, the limitations placed upon the number of such inspections by the procedural requirements of a warrant could not be expected to have a devastating effect on enforcement and compliance with the government forecasts.

As a final effort by the Secretary to expand the warrantless search doctrine of *Biswell* so as to authorize warrantless OSHA inspections, the Secretary cites for authority a number of federal regulatory statutes and cases. It is submitted that not one of these statutes have been judicially construed so as to support the Secretary's position. If one considers the cases cited by the Secretary interpreting inspection provisions of the Food, Drug and Cosmetic Act (21 U.S.C. § 374(a)), each of the cases allowing warrantless FDA inspections has done so on the ground that the business inspected was pervasively regulated. In describing what is meant by "pervasive regulation" in these cases, the courts make it clear that these decisions do not constitute authority for an extension of *Biswell*. In fact, the district court in *U.S. vs. Del Campo Baking Mfg. Co.*, 345 F.Supp. 1371 (D. Del. 1972), expressly interpreted this Court's decision in *Biswell* and arrived at the result that warrantless FDA inspections were allowable in the "pervasively regulated" food and drug business:

"The fact that Congress has not required the Del

Campo business to obtain federal licenses to operate is wholly immaterial. Defendants' business of manufacturing, processing, packing and distributing food products for the introduction into interstate commerce is as 'pervasively regulated' by the federal Food, Drug and Cosmetic Act and the regulations promulgated thereunder, as if it were federally licensed. No rationale or valid distinction can be drawn for compliance inspections between a federally licensed business and one so completely regulated by the Act under the commerce power." 345 F.Supp. at 1376, 1377.

*U.S. vs. Business Bldrs., Inc.*, 354 F.Supp. 141 (N.D. Okla. 1973) also involved the validity of warrantless inspections under the federal Food, Drug and Cosmetic Act and followed the reasoning in *Del Campo Baking* in authorizing warrantless inspections. Attention should be drawn to the fact that both *Del Campo Baking* and *Business Bldrs.* were decided before *Almeida-Sanchez*, *Western Alfalfa* and *G. M. Leasing Corp.* reaffirmed *Camara* and *See* and delimited *Colonnade* and *Biswell*. It should also be pointed out that there is a split among the Circuit Courts of Appeal on the issue of whether FDA inspections may be conducted without search warrants. The Third, Fifth, Eighth and Ninth Circuit Courts of Appeal have all held that non-consensual FDA inspections must be conducted pursuant to a valid search warrant. *See, U.S. vs. Alfred M. Lewis, Inc.*, 431 F.2d 303 (9th Cir., 1970) *cert. den.* 400 U.S. 878; *U.S. vs. Thriftmart, Inc.*, 429 F.2d 1006 (9th Cir., 1970) *cert. den.* 400 U.S. 926; *U.S. vs. Kramer Groc. Co.*, 418 F.2d 987 (8th Cir., 1969); *U.S. vs. Hammond Mill. Co.*, 413 F.2d 608

(5th Cir., 1969), *cert. den.* 396 U.S. 1002; *U.S. vs. Stanack Sales Co.*, 387 F.2d 849 (3rd Cir., 1968).

In *U.S. ex rel Terraciano vs. Montanye*, 493 F.2d 682 (2nd Cir., 1974), the Court ruled that Fourth Amendment safeguard provisions were not violated by a warrantless inspection and seizure of the narcotics records of a licensed pharmacist. The Court quoted *Biswell* with approval in expressly following the rationale that regulatory inspections of pervasively licensed businesses constituted an exception to the warrant requirement.

The case of *U.S. vs. Litvin*, 353 F. Supp. 1333 (D. D.C. 1973), also apparently relied upon by the Secretary, fails to support his position for the reason that the Court held that the inspection there proceeded pursuant to voluntary consent.

Likewise, the *Biswell* construction of pervasive regulation served as the rationale in *Youghioghenny and Ohio Coal Co. vs. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973), wherein a three-judge panel upheld the constitutionality of warrantless searches under the inspection procedures set forth in the federal Coal Mine Health Act of 1969, 30 U.S.C. § 1801, et seq. Although its decision was based upon implied consent, inferred from participation in the "pervasively regulated" coal industry, the Court admitted to also having been impressed by the imminent, inherently dangerous nature of the business:

"Our view might be entirely otherwise were we not dealing with a business context of a nearly inher-

ently dangerous type. If Congress, for example, after taking note of the wide incidence of crime, authorized warrantless entry into private homes, we would be unable to reconcile such a statute with the command of the Fourth Amendment." 364 F. Supp. at 52, n. 7.

The fact situation in *Youghioghenny* also clearly distinguishes that court's decision from the circumstances of OSHA inspections. As discussed above, the businesses subject to OSHA's jurisdiction are not historically nor pervasively regulated, and, further, the vast majority of such businesses are not of an "inherently dangerous type."

Application of the "open fields" doctrine set forth in *Western Alfalfa* was applied in the case of *U.S. vs. Western & A.R.R.*, 297 F.482 (N.D. Ga. 1924).

The remaining three cases cited by the Secretary interpreting the inspection provisions of OSHA have been discussed above.<sup>22</sup> Suffice it to say that these cases represent weak authority, at best, for the Secretary in light of the great weight of authority on the other side of the issue.

### III

BASED ON RELEVANT PROBABLE CAUSE STANDARDS, CAMARA WARRANTS ARE NOT "SYNTHETIC", RATHER, THEY PROVIDE PROPER PROTECTION IN A CIVIL CONTEXT.

In the event this Court determines that OSHA ad-

<sup>22</sup>*Supra*, n. 10 (Contra:).

ministrative inspections are not excepted from the Fourth Amendment warrant requirements, the question arises as to precisely what probable cause standards apply in an OSHA administrative search under the doctrine of *Camara* and *See*. This question appertains whether the Court affirms the decision below or remands with instructions upholding the constitutionality of Section 8(a) of the Act on the basis that it implies a warrant requirement. This "grounds-for-inspection" issue merits analysis in this case because a determination of what grounds should be required is relevant to the question of whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara*, 387 U.S. at 533. In cases where warrants are required to search, the Court in *Camara* defined "probable cause" as "the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." 387 U.S. at 534. It is here, in determination of the probable cause standard for the issuance of a search warrant, that *Camara* provides for the only "balancing test":

"Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 537-538.

As pointed out in part IIB, there is no balancing test afforded for determining whether a proposed search should be excepted from warrant requirements. But when one analyzes what is reasonable in order to determine the probable cause standard for issuance of a warrant, the government inspection interest is bal-

anced against the absolute privacy interests which would be invaded by such inspection.

In developing its flexible probable cause standard, the Court rejected the standard normally used in criminal cases: "... probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced." 387 U.S. at 534. This "flexible" probable cause standard came under scathing attack in the dissent in both *Camara* and *See* by Mr. Justice Clark, joined by Mr. Justice Harlan and Mr. Justice Stewart. 387 U.S. at 546. Mr. Justice Clark claimed that the new "probable cause" requirement for the issuance of warrants suggested by the Court in *Camara* "would permit the issuance of paper warrants, in area inspection programs, with probable cause based on area inspection standards as set out in municipal codes, and with warrants issued by the rubber stamp of a willing magistrate." 387 U.S. at 547-548.

It is submitted that such "rubber stamp warrants" are precisely what the Secretary and *amicus* A.F.L.-C.I.O. propose in the event OSHA inspections are subject to warrant requirements. The Secretary suggests that the *Camara* probable cause standard will be met for OSHA purposes by a mere "showing that the location apparently houses a covered employee work place." Brief for the Appellants, 51. *Amicus* A.F.L.-C.I.O. contends that the Secretary could obtain a warrant by presenting to a magistrate the current administrative standards for conducting an OSHA inspection. Brief for A.F.L.-C.I.O. as *Amicus Curiae*, 24. As an example of a warrant obtained by a mere showing of a valid

public interest in the effective enforcement of a statute sufficient to justify the administrative inspection sought, *amicus* A.F.L.-C.I.O. directs attention to the case of *U.S. vs. Goldfine*, 538 F.2d 815 (9th Cir., 1976). In that case, a search was conducted pursuant to a warrant obtained under Section 510 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 880. The statute, which was passed after *Camara* and *See*, defines "probable cause" in terms of a "valid public interest" in its enforcement sufficient to justify the warrant. 21 U.S.C. § 880(d). However, *amicus* A.F.L.-C.I.O.'s example is subject to the criticism that the Comprehensive Drug Abuse Prevention and Control Act of 1970, *supra*, pervasively regulates and licenses ("registers") the manufacturers distributors and dispensers under its jurisdiction. 21 U.S.C. §§ 821-829. In fact, a valid question arises as to whether warrants would be required at all under that act in light of the close, pervasive regulation.

The question here is whether the tests suggested by *Camara* for periodic administrative inspection, based, as urged by the Secretary, solely upon the passage of time, or upon an area inspection as part of a plan to check conditions of an entire area, can be extended to the fact situations present in OSHA inspections. It is recognized that probable cause standards in administrative inspections must be different (although not necessarily "less") than the sort of probable cause required for warrants in criminal situations. *Camara*, 387 U.S. at 538. In *Camara*, the Court was dealing with health and safety inspections of area residential housing. OSHA's inspection mandate is far broader—so broad, it is submitted, that the *Camara* examples of

passage of time and area characteristic tests for probable cause would not necessarily apply. Rather, it is suggested that the third test of probable cause suggested by *Camara* should be the starting point: "The nature of the search that is being sought." 387 U.S. at 538. It is submitted that a "reasonable" probable cause standard could be based on a "principle of general justification"<sup>30</sup> requiring, at a minimum, a showing that the following two factors are present with regard to the specific work place to be inspected:

- (1) A showing that the proposed intrusion into the subject privacy interests is justified by an overriding governmental interest in protecting people from *serious harm*; and
- (2) That the proposed intrusion has been tailored as narrowly as possible consistent with the particular governmental interest.

Application of the foregoing test would require a showing by the OSHA inspector to the magistrate that the general safety and health purposes of the inspection had some direct relationship to the work environment to be inspected. In other words, the mere general showing of a valid public interest as declared in the act should not constitute sufficient probable cause for the issuance of an inspection warrant. In each case, the inspector should be required to show, as a minimum, facts demonstrating that the statutory findings of present danger to safety and health of employees apply to a reasonably relevant fact situation (e.g., an

<sup>30</sup>White, J.B., *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, THE SUPREME COURT REVIEW, 165, 179-180 (Philip B. Kurland, ed., 1974).

industry-wide problem, an area health hazard, or specific complaints) directly affecting the business to be investigated. It is precisely because of OSHA's unique breadth and scope that such reasonable specificity must be shown in order to achieve sufficient probable cause to justify an inspection warrant. Warrants issued on over-broad fact bases will most certainly be the "synthetic", "box-car" warrants of the type proposed by *amicus* A.F.L.-C.I.O., where the inspector will drop by the magistrate's chambers "on a regular basis—once a week, for example" and pick up a stack of form warrants. Brief for A.F.L.-C.I.O. as *Amicus Curiae*, 26.

Barlow's urges that the proposed probable cause standard would neither frustrate the operation of the OSHA program nor its ultimate purposes. *Camara's* calls for "universal compliance" (387 U.S. at 535) and "the public interest demands that all dangerous conditions be prevented or abated" (387 U.S. at 532) should be rejected as a justification for a diluted probable cause test. The issue is not total, universal compliance, but whether the proposed probable cause test will permit an acceptable level of administrative enforcement.

The proposed probable cause standard also calls for review of the function of the magistrate. At the risk of repetition, it is submitted that there remains a great risk that the warrant procedure will become a rubber stamp process unless items of proof relevant to the particular object of inspection are left for determination by the magistrate. This court has long praised the warrant process as an "orderly procedure"<sup>40</sup> whereby

<sup>40</sup>*U.S. vs. Jeffers*, 342 U.S. 48, 51 (1951).

a "neutral and detached magistrate"<sup>41</sup> can make "informed and deliberate determinations"<sup>42</sup> on the issue of probable cause. In view of the inspecific, broad investigative goals with which the OSHA inspectors are charged, it is necessary that we trust the judgment and common sense of the magistrates to perform their critical supervisory duty of applying the general governmental need to the particular privacy interests of the employer concerned.<sup>43</sup> In his concurring opinion in *Almeida-Sanchez*, Mr. Justice Powell was compelled to list a number of relevant factors to be considered in developing standards for probable cause in that fact situation. 413 U.S. at 283-284. Significantly, these relevant factors all serve the function of rationally tying the broad provisions of the law to the unique facts associated with the particular privacy interests involved.

In the context of OSHA inspections, an inspector can be required to present a number of factors to the magistrate for his review, including the following: (1) the history of past violations; (2) the nature of

<sup>41</sup>*Johnson vs. U.S.*, 333 U.S. 10, 14 (1948).

<sup>42</sup>*Aguilar vs. Texas*, 378 U.S. 108, 110 (1964).

<sup>43</sup>The subject of administrative probable cause has been the subject of considerable analysis by commentators. See, e.g., White, J.R., *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, *THE SUPREME COURT REVIEW*, 165 (Philip B. Kurland, ed.; 1974); Lefave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, *SUPREME COURT REV.* 1, (Philip B. Kurland, ed.; 1967); Landynski, *SEARCH AND SEIZURE AND THE SUPREME COURT*, Chapter IX, *Administrative Privacy*, 245-262; Comment, *OSHA vs. The Fourth Amendment*, 29 *BAYLOR L. REV.* 283 (1977); Comment, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 *ALBANY L. REV.* 115 (1967); Comment, *Due Process and Employee Safety*, 84 *YALE L.J.* 1380 (1975); Comment, *The Supreme Court, 1972 Term*, 87 *HARV. L. REV.* 57, 196-204 (1973-1974); Sonnenreich and Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment*, 24 *S.W.L.J.* 418 (1970); Note, *Administrative Search Warrants*, 58 *MINN. L. REV.* 607 (1974); Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 *CAL. L. REV.* 1011 (1973).

products or chemicals produced or handled by employees and those inherently dangerous elements involved in same; (3) employee complaints and statements or complaints from competitors, suppliers, neighbors, etc., which tend to show violation of the Act; (4) the health and safety record of the employer (a) as maintained by OSHA and (b) as maintained by the employer; (5) categorical facts, such as industry-wide problems or product problems which are the subject of the national emphasis programs; and (6) jurisdictional factors.

Finally, the Court's attention is drawn to the recent case of *Marshall vs. Shellcast Corp.*, Civil No. 77-P-0995-E (N.D. Ala., August 10, 1977), as an example of the proper exercise of judicial supervision in the context of an OSHA inspection. OSHA inspectors went to the premises of defendant Shellcast Corporation, a foundry, for the purpose of conducting a compliance investigation pursuant to a national emphasis program (N.E.P.), which program targeted the iron and steel foundry industry. Denied entrance by Shellcast, the OSHA inspectors, upon affidavit, obtained an order from the magistrate directing Shellcast to allow the inspection. At issue before the district court on stipulation, the court faced the question whether probable cause had been established by OSHA. The court acknowledged the impact of the N.E.P. information, but refused to grant the requested search warrant on the ground that more particular, individualized information was available to the OSHA inspector regarding relevant probable cause facts:

"In short, the court, while certainly recognizing

What *Camara* has said, is also saying that when individualized information is present, OSHA or other similarly situated organizations cannot close their eyes to the individual situation, relying upon some national accumulated group of statistics.

\* \* \*

"I find it unreasonable to make request for searches where the basis for the search, namely, incident rates for the particular company are not even inquired into or reported to the magistrate and indeed only statistics for the industry as a whole are used." *Marshall vs. Shellcast Corp.*, *supra*.

The court also indicated a number of other particular, relevant facts it might have considered in the context of that case had they been present. Most significantly, this Court exercised its historical function of judicial supervision and determined the reasonableness of the probable cause showing made by the inspector in light of all the surrounding circumstances. Failure to reserve the historical position of the magistrate in deciding the relevance of the application for search to the facts of the individual case will inevitably lead to watered-down due process requirements so as to produce a "synthetic search warrant" as decried by Justice Frankfurter. Synthetic search warrants handed out in gross with no independent judicial analysis amount to the same thing as an exception to the warrant requirement.

If, in some sense of hard, pragmatic scrutiny, some compromise must be made, which is the best route to take? It would appear that this Court has already answered this question in that it began to go one

way in *Frank vs. Maryland, supra*, and then reversed itself and charted another course in *Camara* and *See*. It appears that the Court has chosen to allow the various valid interests to compete on a flexible, probable cause standard—but to do so by maintaining in the process the presence of the independent magistrate with the duty to determine the ultimate standard: Reasonableness. Therein lies the heart of the Barlow case: The presence of the independent magistrate vested with the full authority to decide the issue of reasonableness in determining the standards of probable cause to issue inspection warrants must be maintained.

#### IV

#### CONGRESS' CLEAR INTENTION TO AUTHORIZE WARRANTLESS INSPECTIONS FORECLOSES JUDICIAL RECONSTRUCTION OF § 8(a) OF THE ACT.

##### *A. Congress Intended that the Act be Enforced By a Program of Warrantless Work Site Inspections.*

The Secretary contends, unequivocally, that Congress intended to establish an OSHA enforcement program containing the power to inspect all work places affecting interstate commerce without resort to search warrants issued upon a showing of probable cause. Brief for the Appellant, 12, 19-20.

Barlow's concurs with the Secretary's position. Every occupational safety and health bill introduced in either house of the 91st Congress included authority to inspect without warrants. As an author of the Act commented early this year:

"[I]t is important to note that warrantless civil inspections are both absolutely essential to this act's enforcement and a longstanding Federal practice."

• • •

"When we passed this Act, we not only acknowledged that similar inspection authority was essential . . . , [w]e admitted as much by unanimous action as well as words, for no bill was introduced, reported or passed in either House which did not include such authority." 123 Cong. Rec. H163 at H164 (daily ed. January 6, 1977) (remarks of Congressman Steiger).

Section 9(a) of the original H.R. 16785 sought to authorize the Secretary of Labor, upon presentation of credentials to the owner, operator, or agent in charge, to "enter upon at reasonable times any work place where work is performed to which this Act applies; and . . . to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein . . . ." H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 6 (1970).

The membership of the House Committee on Education and Labor were made aware of and alerted to the dangers of the extraordinary powers contemplated under the bill. The minority protested the "Ill-advised inspection provisions" in the committee's report.

"H.R. 16785 authorizes search of employer establishments for safety and health violations. Such searches

may be conducted without a warrant and individuals who are not government officials may participate in the search. Evidence so obtained may be used in a criminal prosecution. Anyone who gives advance notice of, or who forcibly resists such a search may be subject to criminal prosecution.

\* \* \*

"The fourth amendment of our constitution was designed to safeguard the privacy and security of individuals against arbitrary invasions and searches by government officials. (*Norman See v. City of Seattle* 387 US 541; *Camara v. Municipal Court* 387 US 523). The amendment is a concrete expression of a right that is basic to a free society. (*Wolf v. Colorado* [sic], 338 US 25, 27). As a general rule, a search of private property must be decided by 'a judicial official, not by a police or government enforcement agent.' (*Johnson vs. US* 333 US 10, 14).

"Yet, instead of limiting this extraordinary power to government agents acting in carefully restricted circumstances, the bill provides for participation in the search by nongovernment personnel.

\* \* \*

"Lastly, it should be noted that the only way an employer may test the constitutional validity of the search provided for by this legislation is by risking a conviction for forcibly resisting the effort to inspect.

"We do not oppose inspections designed to protect the public or employees from unsafe and unhealthy work conditions. But we believe that the penal and

other provisions that accompany the search procedures provided for in H.R. 16785 are untenable and unnecessary." *Id.* at p. 55 ("Additional Minority Views of Representatives Scherle, Ashbrook, Eshleman, Collins, Landgrebe, and Ruth").

The committee's report is conclusive as a showing of Congress' intent for two reasons. First, the "Steiger-Sikes substitute", H.R. 19200, was authored by Congressman William Steiger, a member of the House committee which considered H.R. 16785. The purpose for the substitute was to provide separation of certain administrative powers between the Secretary of Labor and independent commissions. 116 Cong. Rec. 38370 (1970). While Section 9(a) of H.R. 19200 described "work place" with more particularity and introduced the words "without delay" to the proposed inspection provisions (116 Cong. Rec. 31876 (1970)), the substitute was not intended to modify the presumed authority to search without warrants found in H.R. 16785.

"[T]he basic ingredients of H.R. 16785 are included in the Steiger-Sikes substitute—mandatory standards, inspections and enforcement, penalties for violations, a remedy for circumstances where a danger of harm in a work place is imminent, emergency standards for toxic or hazardous new substances.

"Where these two bills differ is in the procedural structure provided for carrying out the responsibilities created by the legislation." 116 Cong. Rec. 38370 (1970) (remarks of Congressman Steiger, co-author of H.R. 19200.

The purpose of Section 9(a) of H.R. 19200 was explained during debate by Congressman Galifonakis for the express purpose of ensuring that all understood the extraordinary powers thereby conferred.

"... I think there are some provisions of H.R. 19200 which need clarification. Unless the intent of these provisions is explained for the record, I fear that we may lose some of the effectiveness of this bill." 116 Cong. Rec. 38709 (1970).

Messrs. Galifonakis and Steiger went on to explain that the new phrase, "without delay," was meant only to add weight to the provisions of the proposed bill penalizing interference with inspectors by subterfuge to avoid immediate entry, and also that the inspector could enter a work place armed with nothing more than the credentials issued to him by the Secretary of Labor in the face of apparent attempts to withhold consent and block entry into private property. 116 Cong. Rec. 38709 (remarks of Congressmen Steiger and Galifonakis).

Congressman Steiger's comment that the inspectors would, "of course, have to act in accordance with applicable constitutional protections" does not detract from the evidence of Congress' intent. Such vague assurances demonstrate only that Congress did not intend to violate the Constitution, not that it did not intend to enact legislation that is, in fact, unconstitutional. 116 Cong. Rec. 38709.

The second reason is that the committee report remained the official report on H.R. 16785 during its

passage, except for those provisions of the "Steiger-Sikes substitute" which removed certain administrative and review powers from the Secretary of Labor (*see*, 116 Cong. Rec. 38370 (remarks of Congressman Steiger)).

On November 24, 1970, H.R. 16785, as that day amended by substitution of H.R. 19200, was adopted by the House of Representatives as an amendment to S. 2193 which had recently come from the Senate. 116 Cong. Rec. 38715, 38724, and 38733 (1970). The warrantless search provisions of H.R. 16785 were not modified by the amendment, and the language "without delay" found in the House version of S. 2193 was retained by conference committee. Section 9(a) of S. 2193, as amended, became Section 8(a) of the Act. H.R. Rep. No. 91-7765, 91st Cong., 2nd Sess., 10 and 36 (1970).

Clearly, Congress' intent was to provide for warrantless inspections *and nothing else* in furtherance of the enforcement program of the Occupational Safety and Health Act of 1970.

*B. Judicial Reconstruction of § 8(a) to Provide for Inspections Under Search Warrants is Inappropriate in the Face of Congress' Intent to Dispense with the Neutral Magistrate.*

The Secretary errs in submitting that the Court should disregard the clearly expressed legislative intent and redraft the statute to preserve the enforcement scheme. If the warrantless inspection program is found unconstitutional, the Court should, contends the Secretary, preserve the statute by judicial draftsmanship

even though Congress clearly intended that no warrants be utilized in the fast, summary, administratively efficient enforcement program envisioned.

Barlow's respectfully submits that the Secretary's position is unsupportable for two reasons. First, such reconstruction in the face of clear, contrary legislative intent would contravene well established principles of statutory construction.

"It is clear, of course, that no act of Congress can authorize the violation of the Constitution. But under familiar principles of constitutional adjudication, our duty is to construe the statute, *if possible*, in a manner consistent with the Fourth Amendment." *Almeida-Sanchez vs. U.S.*, 413 U.S. 266, 272 (1973) (emphasis supplied).

Clearly implied in this statement is an historically recognized limitation on the judicial power to interpret legislative acts. A court's object in construing a federal statute is to ascertain the congressional intent and to give effect to the legislative will. *Philbrook vs. Glodgett*, 421 U.S. 707 (1975). Where Congress' intent is clear, the judiciary may not seek to preserve an act from constitutional infirmities by perverting the legislative will. "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *National R.R. Passenger Corp. vs. National Assn. of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Neuberger vs. Commissioner*, 311 U.S. 83 (1940); and *U.S. vs. Barnes*, 222 U.S. 513 (1912).

The various maxims of statutory construction may aid in discovering the legislative intent, but they are not rules of law and "can never override clear and contrary evidence of congressional intent." *Neuberger vs. Commissioner*, *supra* at 88. Barlow's respectfully submits that resort to rules of construction where it is clear none are needed would be the antithesis of sound statutory construction by the judiciary.

Second, Congress' purpose and intent in enacting the Occupational Safety and Health Act of 1970 is clearly and extensively set forth in § 2 of the Act. 29 U.S.C. § 651. Among the methods adopted to achieve Congress' aim was the establishment of "an effective enforcement program which . . . include[d] a prohibition against giving advance notice of any inspection and sanctions for any individual violating . . . [the] prohibition." 29 U.S.C. § 651 (b) (10).

To presume that Congress, if faced with a warrant requirement for OSHA inspections, would prefer a judicially designed enforcement program requiring resort to coercive search warrants would be speculative. Congress may choose to avoid the encumbrances of a search warrant procedure by adopting a less constitutionally sensitive enforcement program. Congressman Steiger's recent remarks about the "absolute" necessity of "warrantless civil inspections" to the present enforcement scheme lends support to this point. *See*, 123 Cong. Rec. H163 (daily ed. January 6, 1977).

As the court below suggested:

"There are other less obtrusive and oppressive

methods of accomplishing the intended result, e.g., employer reporting requirements with provisions for employee contribution and participation; employer-employee safety committees; encouragement of employee complaints; in the organized management-labor relations field a greater and more forceful input by labor unions as the safety representative of their members; efforts toward better enforcement by the states of their health and safety laws, etc." J.S. App. A 7a-8a, n. 4.

Recently, Congress and the Executive branch of government have been actively exploring such other means of enforcement and monitoring for the Act. 123 Cong. Rec. E4793 (daily ed. July 25, 1977) (remarks of Congressman Hansen, 2nd Dist. Idaho).

*C. The Courts Which Have Held § 8(a) of the Act to Require Warrants Have Failed to Appreciate the Clear Legislative Intent to Dispense with Warrants.*

The overwhelming weight of authority coming from state and lower federal courts holds that nonconsensual, warrantless inspections by OSHA violate the provisions of the Fourth Amendment. The courts have divided, however, on the constitutionality of Section 8(a) of the Act. (See, footnote 10).

One line of decisions adopting the reasoning of Circuit Judge Gee in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 (1976), has held that § 8(a) of the Act requires search warrants and is, therefore, constitutionally enforceable. The other line of decisions following the lead of the lower court herein has re-

jected judicial redrafting of the Act as inappropriate in the face of Congress' intent to avoid the necessary warrants.

The opinions of the first group of cases reflect the courts' reliance upon Judge Gee's analysis. See, *Dunlop vs. Hertzler Ent., Inc.*, 418 F.Supp. 627, 634 nn. 16 & 17 (D. N. Mex. 1976). The *Gibson's Products* case and Judge Gee's interpretation of the Act are founded upon an incomplete understanding of the Act's legislative history. After concluding, properly, that the warrantless search attempted in that case could not comply with the Fourth Amendment, the court turned to the question of the constitutionality of Section 8(a) of the Act. The court found the legislative history of the Act to be "generally silent" on Congress' intentions concerning warrantless searches.

"The only suggestion that the statute contemplates warrantless searches is a passing remark to that effect in the minority views on a version of the bill which was rejected. See, H.R. Rep. No. 1291, 91st Cong., 2nd Sess., 55 (1970). The only discussion of the 'without delay' phrase shows that it was intended to prevent an employer from thwarting inspections by avoiding the inspector's presentation of credentials. 116 Cong. Rec. 38709 (1970) (remarks of Congressman Galifianakis, quoting Congressman Steiger). The author of the 'without delay' phrase reminded the House that inspections would have to be conducted in accordance with 'applicable constitutional protections.' *Id.* (remarks of Congressman Steiger)." *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F. Supp. 154, 162 n. 18 (1976).

The court concluded that it was "spared the necessity of invalidating the OSHA inspections" provisions. 407 F. Supp. at 162.

The quoted footnote demonstrates that the *Gibson* court failed to understand, (1) that the inspection provisions originally set forth in H.R. 16785 were intended to be construed solely as providing for warrantless searches and (2) that these provisions were incorporated without charge of intent into the "Steiger-Sikes substitute" which was then passed into law. By incorrectly finding that the intent of Congress was unclear, the court was placed in a position to construe the statute as constitutional. The court bolstered its decision by pointing to provisions of the agency's Compliance Operations Manual and 29 C.F.R. § 1903.4 which formerly provided for the obtaining of "inspection warrants" upon refusal of entry. These initial provisions for inspection warrants were later deleted by the Secretary. "Equally, the inference could be drawn from these events that as the Secretary became more familiar with the Act and its administration, he amended the Compliance Manual in order to bring it into line with actual congressional intent. The Secretary seems to agree with this interpretation of his own behavior.

In the *Barlow's, Inc. vs. Usery* decision below, Circuit Judge Anderson, Circuit Judge Koelsch, and Chief District Judge McNichols rejected Judge Gee's finding of presumed congressional intent. The court below found the intent of Section 8(a) of the Act to be clear and unconstitutional, and therefore declined to judicially redraft it. J.S. App. A 10a.

Barlow's submits that Congress mandated an unconstitutional enforcement procedure which this Court must strike down by affirming the judgment below.

## CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,  
RUNFT & LONGETEIG,  
CHARTERED

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EXHIBIT A.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

Civil No. \_\_\_\_\_

IN THE MATTER OF  
ESTABLISHMENT INSPECTION OF:

Barlow's Inc.  
225 West Pine  
Pocatello, Idaho

ORDER

This matter having come before the Court on an Order to Show Cause and the applicant, United States of America, having appeared and being represented by the United States Attorney for the District of Idaho, and Barlow's Inc. having appeared by its counsel,

\_\_\_\_\_ of \_\_\_\_\_, Idaho, whereat evidence was taken and argument heard, and for good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, United States Department of Labor, Occupational Safety and

Health Administration, through its duly designated representative or representatives, are entitled to, and shall have hereby, entry upon the premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho, and upon said business premises to conduct an inspection and investigation as provided for in Section 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.), as part of an inspection program designed to assure compliance with that Act; that the inspection and investigation shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor, at 29 C.F.R., Part 1903; that appropriate credentials as representatives of the Occupational Safety and Health Administration, United States Department of Labor, shall be presented to the Barlow's Inc. representative upon said premises and the inspection and investigation shall be commenced as soon as practicable after the issuance of this Order and shall be completed within reasonable promptness; that the inspection and investigation shall extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, Barlow's Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials and all other things therein (including but not limited to records, files, papers, processes, controls, and facilities) bearing upon whether Barlow's Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its em-

ployees, and whether Barlow's Inc. is complying with the Occupational Safety and Health Standards promulgated under the Occupational Safety and Health Act and the rules, regulations, and orders issued pursuant to that Act; that representatives of the Occupational Safety and Health Administration may, at the option of Barlow's Inc., be accompanied by one or more employee of Barlow's Inc., pursuant to Section 8(e) of that Act; that Barlow's Inc., its agents, representatives, officers, and employees are hereby enjoined and restrained from in anyway whatsoever interfering with the inspection and investigation authorized by this Order and, further, Barlow's Inc. is hereby orderd and directed to, within five working days from the date of this Order, furnish a copy of this Order to its officers and managers, and, in addition, to post a copy of this Order at its employee's bulletin board located upon the business premises; and Barlow's Inc. is hereby ordered and directed to comply in all respects with this order and allow the inspection and investigation to take place without delay and forthwith.

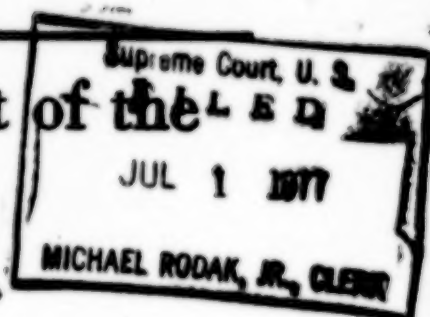
Dated this \_\_\_\_ day of December, 1975.

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JUDGE, U.S. DISTRICT COURT

# In the Supreme Court of the United States

OCTOBER TERM, 1976



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No. 76-1143

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RAY MARSHALL, SECRETARY OF LABOR, et al.,  
*Appellants,*

vs.

BARLOW'S, INC.,  
*Appellee.*

---

On Appeal from the United States District Court for  
the District of Idaho

---

**Brief *Amicus Curiae* of Sierra Club; Oil, Chemical  
and Atomic Workers International Union; and  
Friends of the Earth in Support of Appellants**

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**Brief *Amicus Curiae* of Sierra Club; Oil, Chemical  
and Atomic Workers International Union; and  
Friends of the Earth in Support of Appellants**

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**INTRODUCTION**

This *amicus curiae* brief is filed on behalf of the Sierra Club, the Oil, Chemical and Atomic Workers International Union, and Friends of the Earth in support of the Government's position on appeal. Pursuant to Supreme Court Rule 42(2), consent to the filing of this brief has been given by the parties herein. The exchange of correspondence documenting such consent is on file with the Clerk of the Court.

### INTEREST OF THE AMICI

Amicus Sierra Club, a non-profit corporation, is an international environmental and conservation organization with approximately 175,000 members in the United States. A stated corporate purpose of Sierra Club is "To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general." This includes not only the natural environment, but also the environment of the modern industrial workplace. Sierra Club actively supported enactment of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (OSHA), including the inspection provisions at issue herein, and has called for stronger enforcement of that Act. By resolutions of its Board of Directors, Sierra Club has supported the Oil, Chemical and Atomic Workers International Union, and other workers in their efforts to obtain working conditions which are environmentally safe.

The decision of the three-judge district court below, if allowed to stand, will place a serious obstacle in the way of the Occupational Safety and Health Administration in attempting to safeguard the environment of working Americans. Moreover, the sweeping generality of the court's decision threatens the ability of federal and state regulatory agencies throughout the country to control air and water pollution. Only months ago, for example, with the active support of the Sierra Club, the Congress enacted the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (1976), a central provision of which is its authorization of warrantless inspections similar to those invalidated by the district court herein. See 15 U.S.C. § 2610. Similar administrative inspection provisions appear in many other major federal environmental protection statutes the passage of which the Sierra Club strongly favored, and the enforce-

ment of which the Sierra Club is closely monitoring. The Government's ability to implement these laws designed to protect the public health as intended by Congress will also be severely curtailed if the district court's decision is upheld. For these reasons the Sierra Club urges this Court to uphold the inspection provisions in question here.

Amicus Oil, Chemical and Atomic Workers International Union (OCAW) is an international trade union of approximately 200,000 members, many of whom work in the most hazardous working environment imaginable. Due to the prior lack of stringent regulatory monitoring of conditions in the workplace, OCAW's members have for decades been subjected to hazards which are often unrecognizable except through the advent of disease after years of latency. For these reasons OCAW supported the enactment of the Occupational Safety and Health Act of 1970 and has consistently opposed any erosion of its enforcement provisions. In testifying before the Senate when enactment of OSHA was under consideration, OCAW took the position that any bill must include "a task force of inspectors . . . to systematically tour plants and factories in the company of workers and management representatives, and without warning."<sup>1</sup> OCAW concurs with the statement of John Stender, former assistant Secretary of Labor, that

"The inspection program alone cannot create a safe and healthful work environment. The efforts of both employers and employees are necessary. But inspections are a vital ingredient in bringing about such cooperation. Prior to OSHA, insufficient progress was made by attempts at encouraging job safety and health solely on a voluntary basis or without adequate en-

1. Statement of Anthony Mazzocchi, hearings before the Senate Committee on Labor and Public Welfare, "Occupational Safety and Health Act of 1970," (1970) Part 2 at 1032.

forcement tools. . . . Without the possibility of first instance sanctions and unannounced inspections, the Act would provide little incentive for voluntary compliance."<sup>2</sup>

OCAW members are frequently unaware of violations of health standards in the plant, health standards which are essential to protect them from cancer and debilitating respiratory diseases. Without OSHA's inspection procedures OCAW members would have little to protect them, and non-member chemical workers would have less, in the extremely hazardous environment in which they work. For these reasons the Oil, Chemical, and Atomic Workers have a vital interest in this case.

Amicus Friends of the Earth, a nonprofit corporation, is a national membership conservation group with various branches throughout the United States. It has a membership of approximately 19,000 individuals. The primary purpose of Friends of the Earth is the promotion of sound environmental and conservation principles, including the protection of human health through proper environmental management. In support of a safe working environment, Friends of the Earth has worked for enactment of the Occupational Safety and Health Act and the Toxic Substances Control Act. Friends of the Earth has been particularly concerned with hazardous materials in the workplace and recently co-sponsored with the U. S. Environmental Protection Agency, OCAW and others, a conference titled "Labor Looks at an Environmental Question: Hazardous Wastes." Friends of the Earth is a member of the Urban

2. Statement of Assistant Secretary of Labor, John H. Stender, hearings before the Senate Committee on Labor and Public Welfare, "Occupational Safety and Health Act Review," (1974), at 223.

Environmental Conference, a coalition of approximately 60 labor, environmental, and civil rights groups which supports enactment and strict enforcement of legislation to enhance occupational health.

### SUMMARY OF ARGUMENT

The Fourth Amendment does not necessarily require that administrative regulatory inspections, or "searches," be conducted pursuant to a warrant; such inspections are prohibited only if they are "unreasonable." Routine warrantless inspections as contemplated by Sec. 8(a) of the Occupational Safety and Health Act of 1970 are reasonable under the rationale of *United States v. Biswell*, 406 U.S. 311 (1972) because they are essential to the purposes of the Act and further an urgent federal interest on the one hand and because they pose a minimal threat to legitimate privacy expectations on the other. Additionally, a holding by this Court that Sec. 8(a) is unconstitutional could have a devastating effect upon the multitude of recent public health and environmental protection statutes in which Congress has recognized a need for similar warrantless regulatory inspection schemes.

### ARGUMENT

1. **Warrantless Administrative Inspections as Contemplated by Sec. 8(a), on the One Hand, Are Essential to the Purposes of OSHA and Further an Urgent Federal Interest, and on the Other Hand, Constitute Minimal Invasion of Privacy; They Are Therefore Valid Under the Rationale of *United States v. Biswell*, 406 U.S. 311 (1972)**

The Fourth Amendment to the United States Constitution<sup>3</sup> does not on its face prohibit warrantless searches, but

3. The Fourth Amendment provides:  
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

only "unreasonable" searches. See, most recently, *United States v. Chadwick*, ..... U.S. ...., 45 U.S.L.W. 4797, 4799 (June 21, 1977). This Court has, however, frequently interpreted the constitutional language so as to render warrantless searches presumptively unreasonable, and therefore unconstitutional, in all but "certain carefully defined classes of cases." *Camara v. Municipal Court*, 387 U.S. 523, 528-9 (1967); *G.M. Leasing Corp. v. United States*, ..... U.S. ...., 97 S.Ct. 619, 628-9, 631 (1977). Those classes of cases which constitute exceptions to the general rule that warrantless searches are "unreasonable" include, for example, border searches, *United States v. Ramsey*, ..... U.S. ...., 45 U.S.L.W. 4577, 4579-80 (June 6, 1977); automobile searches, *Chambers v. Maroney*, 399 U.S. 42, 46-52 (1970); searches made incident to a valid arrest, *Chimel v. California*, 395 U.S. 752, 762-3 (1969); and searches where the object of the search is in "plain view" and/or the search is made in the "open fields," *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861, 864-5 (1974).

*Amici* submit that this case falls within another such "class of cases," to wit, administrative regulatory inspections of commercial and industrial structures intended to ensure compliance with statutes designed to protect the public health, where a warrant requirement would frustrate the purposes of the statute. In this class of cases, the Court has adopted a case by case balancing approach to determine whether the Fourth Amendment mandates a warrant,

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seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

balancing the urgency of the federal interest sought to be furthered by the warrantless inspection provision and the degree to which this interest would be frustrated by a warrant requirement, on the one hand, and the potential for abuse and the threat to legitimate privacy expectations posed by the provision on the other. *United States v. Biswell*, 406 U.S. 311, 316-317 (1972). See also *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967); *See v. City of Seattle*, 387 U.S. 541, 546 (1967); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970).

In the companion cases of *Camara* and *See, supra*, the first to deal squarely with this issue, the Court found that the balance tilted towards requiring a warrant for routine administrative inspections by city officials for possible violations of municipal housing and fire codes. This was because, as the Court stated,

"It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." *Camara, supra*, at 387 U.S. 533.

In the more recent decision of *United States v. Biswell*, 406 U.S. 311 (1972), on the other hand, the Court with but one dissent, and by the same author as in *Camara* and *See* (Mr. Justice White) upheld as reasonable within the meaning of the Fourth Amendment the warrantless inspection of business premises pursuant to the Federal Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* The Court elaborated upon its prior conclusion that the regulatory schemes in *Camara* and *See* could be reasonably enforced within the context of a warrant requirement:

"In *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), the mission of the inspection system was to discover and correct violations of the

building code, conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue."

*United States v. Biswell*, *supra*, at 406 U.S. 316.

With respect to the Gun Control Act, however, the Court found that

"It is . . . apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment." *Ibid.*

In reaching this result, the Court paid great deference to the "Congressional Findings and Declaration, Note preceding 18 U.S.C. § 922," which indicated that

"close scrutiny of this [gun] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. . . . Large interests are at stake, and inspection is a crucial part of the regulatory scheme . . ." *Id.* at 406 U.S. 315.

The Court emphasized that

"Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."

406 U.S. 315, and concluded:

"We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat

to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."

*Id.* at 406 U.S. 317.<sup>4</sup> See also *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

With respect to Sec. 8(a) of OSHA, 29 U.S.C. § 657(a),<sup>5</sup> each of the pertinent factors identified in *Biswell* is present: an "urgent federal interest" that would be frustrated by a warrant requirement and the need for "unannounced, even frequent, inspections" to ensure compliance with the statutory goals on the one hand, and minimal possibilities of abuse and threat to the businessman's privacy<sup>6</sup> on the other.

As in the case of the Gun Control Act, Congress has expressly set forth the urgent federal interest in maintain-

4. In light of this Court's recognition, with which *Amici* heartily agree, that the rights protected by the Fourth Amendment "are to be regarded as of the very essence of constitutional liberty," *Harris v. United States*, 331 U.S. 145, 150 (1947), *Biswell* may do no more than state the well-known rule that a compelling governmental interest may justify infringement of the warrant requirement when there are no "less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). As discussed in the text, the circumstances that led Congress to enact Sec. 8(a) of the Occupational Safety and Health Act justify the Court in upholding Sec. 8(a) under that standard as well.

5. Section 8(a) is set out in full in Appendix I.

6. Section 8(a) does not give the compliance officer unlimited authority to search the private recesses of a businessman's office. Rather, the scope of the permissible search is limited to "any factory, plant, establishment, construction site, or other area, work place or environment *where work is performed by an employee of an employer*" (emphasis supplied). Nor does Sec. 8(a) give the federal agent authority to search out violations of laws other than federal safety and health regulations. See *Brennan v. Buckeye Industries*, 374 F. Supp. 1350, 1354 (S.D. Ga. 1974). Whether the officer could constitutionally use an OSHA inspection as a pretense to search for evidence of violent crime, tax fraud, or manufacture of contraband, for instance, is not before the Court in this case.

ing safe and healthful working environments in OSHA itself:

"(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

"(b) The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources— . . ." 29 U.S.C. § 651.

This Court has recently had occasion to refer to this urgent federal interest by noting that "After extensive investigation, Congress concluded, in 1970, that work-related deaths and injuries had become a 'drastic' national problem." *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, ..... U.S. ...., 97 S.Ct. 1261, 1263 (1977). What Congress hoped to remedy in enacting OSHA is grimly summed up in the Senate Report, quoted by the Court in *Atlas Roofing* as follows:

"The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today. . . . 14,500 persons are killed annually as a result of industrial accidents; accordingly, during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes. In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages,

and the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. This 'grim current scene' . . . represents a worsening trend, for the fact is that the number of disabling injuries per million man hours worked is today 20% higher than in 1958." S.Rep.No. 91—1282, 91st Cong., 2d Sess., 2 (1970); Leg.Hist. 142 U.S. Code Cong. & Admin.News 1970, pp. 5177, 5178. See also H.R.Rep.No.91—1291, 91st Cong., 2d Sess., 14-15 (1970); Leg.Hist. 844-845 ("The issue of the health and safety of the American working man and woman is the most crucial one in the whole environmental question . . . the worst problem confronting American workers").

*Id.* at 97 S.Ct. 1263, n. 1.

In *Atlas Roofing*, the Court unanimously (Justice Blackmun not participating) upheld the civil penalty fact-finding provisions of OSHA as against a claim that they contravened the Seventh Amendment's right to jury trials in "suits at common law." The Court made but passing reference to Sec. 8(a) in describing the statutory scheme. *Id.* at 97 S.Ct. 1264.

To understand the practical problems involved in the regulation of conditions affecting workers' health and safety, it is necessary to look in some detail at the nature of the hazards regulated by OSHA. Many of these hazards cannot readily be discovered by non-technical workers. It has been estimated that more than seven million workers are exposed to toxic substances regulated by OSHA. These substances are often contained in products sold under trade names; it is thus impossible for the workers to be aware

of the ingredients.<sup>7</sup> Hundreds of chemicals are regulated by OSHA, many considered hazardous at concentrations as low as 0.025 parts per million. See 29 C.F.R. § 1910.1000 *et seq.* Many of these chemicals are "stable, persistent and insidious, with harmful health effects surfacing after long periods of latency."<sup>8</sup> Under such circumstances it cannot be expected that without the aid of technically competent inspectors any but the most blatant, visible violations of regulations will be discovered by the potential victims thereof.

Were OSHA to depend solely upon worker complaints or upon probable cause to justify inspections, the serious hazards which modern chemistry has released into the workplaces of the nation would too often go undetected until disastrous consequences were felt.<sup>9</sup> A general requirement of probable cause or dependence upon employee complaints would leave vast areas of legitimate concern virtually barred to OSHA inspectors, because modern occupational hazards can be subtle and insidious. In order to effectuate the purposes of the Act, therefore, the Occupational Safety and Health Administration must be allowed to rely on "unannounced, even frequent" warrantless inspections and spot-checks, *Biswell, supra*, at 406 U.S. 316, as sanctioned by the Congress in Sec. 8(a).

7. John Finkles, Director of the National Institute for Occupational Safety and Health, in the *Wall Street Journal*, April 28, 1977, at 77.

8. Olpin, "Policing Toxic Chemicals," 1976 Utah L. Rev. 85, 87.

9. The difficulty of discovering the dangers of any given new substance has been recognized by Congress in the area of drugs for many years, see Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, 355, and more recently in the area of toxic substances. Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*

## II. A Holding by This Court That Sec. 8(a) of OSHA is Unconstitutional Would Have a Devastating Effect on the Federal Government's Pollution Control and Public Health Protection Efforts in Many Other Areas.

In the relatively few years of heightened national environmental consciousness since the President signed into law the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, on January 1, 1970, the Congress has enacted an imposing array of comprehensive statutes designed to protect the public health and welfare from further industrial pollution of the human environment. These include the Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.*; the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.*; the Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136 *et seq.*; the Safe Drinking Water Act of 1974, 42 U.S.C. § 300f *et seq.*; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6902 *et seq.*; and the Toxic Substances Control Act of 1976, 15 U.S.C. § 2601 *et seq.* See also the earlier Federal Hazardous Substances Act of 1960, 15 U.S.C. § 1261 *et seq.*

Each one of these statutes provides for warrantless administrative inspections of the particular industry or industries regulated thereby as a central mechanism of ensuring achievement of the statutory goals. The pertinent sections of each Act are set out in full in Appendix II. These provisions in each case are substantially similar to those contained in Sec. 8(a) of OSHA. See, *e.g.*, Clean Air Act, 42 U.S.C. §§ 1857c-9; 1857f-5; Federal Water Pollution Control Act, 33 U.S.C. § 1318; Toxic Substances Control Act, 15 U.S.C. § 2610. Most of these statutes also typically begin, as do OSHA and the Federal Gun Control Act at issue in *Biswell*, with a Congressional declaration

expressing the urgent federal interest sought to be achieved by the statute in general, and by implication the warrantless inspection provisions in particular. *E.g.*, Clean Air Act, 42 U.S.C. § 1857; Federal Water Pollution Control Act, 33 U.S.C. § 1251; Toxic Substances Control Act, 15 U.S.C. § 2601.

Of course none of these statutes is before this Court in this case, and *Amici* do not propose to engage in any further individual analysis thereof. The point we wish to urge on the Court is simply that if the Court upholds the district court's sweeping decision in this case, it would be difficult to see how such a ruling would not severely weaken an enormous number of critically important federal statutes in the environmental and public health field.

Nor do we mean to suggest that warrants should never be required for administrative inspections under environmental and public health protection statutes: we urge, rather, that whether the Fourth Amendment requires a warrant in this particular "class of cases" will turn upon a case-by-case factual analysis balancing the factors articulated in *United States v. Biswell, supra*, and discussed above.

# CONCLUSION

The judgment of the district court declaring Sec. 8(a) of the Occupational Safety and Health Act to be unconstitutional should be reversed.

Respectfully submitted,

July 1, 1977

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***Appendix I***

**Occupational Safety and Health Act,  
29 U.S.C. § 651 et seq.**

29 U.S.C. § 657(a):

(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

*Appendix*  
**Appendix II**

**Clean Air Act of 1970,  
42 U.S.C. § 1857 et seq.**

**42 U.S.C. § 1857e-9(a):**

"For the purpose . . . of determining whether any person is in violation of any such standard or any requirement of such a plan,

"(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1)."

**42 U.S.C. § 1857f-5(c):**

"For purposes of enforcement of this section, officers or employees duly designated by the Administrator, upon presenting appropriate credentials to the manufacturer or person in charge, are authorized (1) to enter, at reasonable times, any plant or other establishment of such manufacturer, for the purpose of conducting tests of vehicles or engines in the hands of the manufacturer, or (2) to inspect at reasonable times, records, files, papers, processes, controls, and facilities used by such manufacturer in conducting tests under regulations of the Administrator. Each such inspection shall be commenced and completed with reasonable promptness."

*Appendix*

**Federal Water Pollution Control Act of 1972,  
33 U.S.C. § 1251 et seq.**

**33 U.S.C. § 1318(a):**

"Whenever required to carry out the objective of this chapter, including but not limited to . . . determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance . . .

"(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause."

**Federal Safe Drinking Water Act of 1974,  
42 U.S.C. § 300f et seq.**

**42 U.S.C. § 300j-4(b)(1):**

"Except as provided in paragraph (2), the Administrator, or representatives of the Administrator duly designated by him, upon presenting appropriate credentials and a written notice to any supplier of water or other person subject to a national primary drinking water regulation prescribed under section 300g—1 of this title or applicable underground injection control program (or person in charge of any of the property of such supplier or other person), is authorized to enter any establishment, facility, or other property of such supplier or other person in order to determine

whether such supplier or other person has acted or is acting in compliance with this subchapter, including for this purpose, inspection, at reasonable times, of records, files, papers, processes, controls, and facilities, or in order to test any feature of a public water system, including its raw water source."

**Federal Environmental Pesticide Control Act of 1972,  
7 U.S.C. § 136 et seq.**

7 U.S.C. § 136g(a):

"For purposes of enforcing the provisions of this subchapter, officers or employees duly designated by the Administrator are authorized to enter at reasonable times, any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices.

Before undertaking such inspection, the officers or employees must present to the owner, operator, or agent in charge of the establishment or other place where pesticides or devices are held for distribution or sale, appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected. If no violation is suspected, an alternate and sufficient reason shall be given in writing. Each such inspection shall be commenced and completed with reasonable promptness. If the officer or employee obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained and, if requested, a portion of each such sample equal in volume or weight to the portion retained. If an analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge."

**Resource Conservation and Recovery Act of 1976,  
42 U.S.C. § 6901 et seq.**

42 U.S.C. § 6927(a):

"For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this subchapter, any person who generates, stores, treats, transports, disposes of, or otherwise handles hazardous wastes shall, upon request of any officer or employee of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer employee of a State having an authorized hazardous waste program, furnish or permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, such officers or employees are authorized—

(1) to enter at reasonable times any establishment or other place maintained by any person where hazardous wastes are generated, stored, treated, or disposed of;

(2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling of such wastes.

Each such inspection shall be commenced and completed with reasonable promptness. If the officer or employee obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge."

**Toxic Substances Control Act of 1976,  
15 U.S.C. § 2601 et seq.**

**15 U.S.C. § 2610:**

"For purposes of administering this chapter, the Administrator, and any duly designated representative of the Administrator, may inspect any establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures or such articles in connection with distribution in commerce. Such an inspection may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner.

(b) Scope.—(1) Except as provided in paragraph (2), an inspection conducted under subsection (a) of this section shall extend to all things within the premises or conveyance inspected (including records, files, papers, processes, controls, and facilities) bearing on whether the requirements of this chapter applicable to the chemical substances or mixtures within such premises or conveyance have been complied with.

(2) No inspection under subsection (a) of this section shall extend to—

- (A) financial data,
- (B) sales data (other than shipment data),
- (C) pricing data,
- (D) personnel data, or
- (E) research data (other than data required by this chapter or under a rule promulgated thereunder),

unless the nature and extent of such data are described with reasonable specificity in the written notice required by subsection (a) of this section for such inspection.

**Federal Hazardous Substances Act of 1960,  
15 U.S.C. § 1261 et seq.**

**15 U.S.C. § 1270:**

"(a) The Secretary is authorized to conduct examinations, inspections, and investigations for the purposes of this chapter through officers and employees of the Department or through any health officer or employee of any State, territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department.

(b) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which hazardous substances are manufactured, processed, packed, or held for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such hazardous substances in interstate commerce; (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle, and all pertinent equipment, finished and unfinished materials, and labeling therein; and (3) to obtain samples of such materials or packages thereof, or of such labeling. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

(c) If the officer or employee obtains any sample, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained. If an analysis is made of such sample, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge."

No. 76-1143

Supreme Court, U. S.

FILED

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**Supreme Court of the United States**

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RAY MARSHALL, SECRETARY OF LABOR, ET AL.,

*Appellants*

v.

BARLOW'S INC.,

*Appellee*

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO

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**BRIEF FOR THE AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS  
AS AMICUS CURIAE**

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## Supreme Court of the United States

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,

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v.

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*Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO

### BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed in support of the position of appellants by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided by Rule 42 of the Rules of this Court.

#### INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 109 national and international labor unions, having a total membership of approximately 14,000,000 working men and women. The Occupational Safety and Health Act of 1970 ("OSHA") was passed, with the active support of the AFL-CIO, to protect workers such as those represented by AFL-CIO affiliates from avoidable injury and illness incurred on the job. The decision of the court below, if upheld, would, in our view, render it impossible for the Secretary of Labor effectively

to enforce OSHA, and thereby endanger the health and safety of millions of American workers. We therefore take this opportunity to present to the Court our view that the inspection scheme contemplated by Congress is not unconstitutional.

### INTRODUCTION AND SUMMARY OF ARGUMENT

The Occupational Safety and Health Act ("OSHA") is a landmark statute enacted in 1970 to correct "the worst problem confronting American workers" (H.R. Rep. No. 91-1291, 91st Cong., 2d Sess., 14(1970),—injuries, illnesses, and deaths resulting from correctable health and safety hazards at places of employment. To insure compliance with the Act's substantive provisions, Congress provided the Secretary of Labor with the authority to inspect any "area, workplace or environment where work is performed by an employee." (Section 8(a), 29 U.S.C. § 657(a).) This case involves two separate questions concerning whether the Fourth Amendment proscribes the inspection system which Congress has authorized.

The first issue is whether the Fourth Amendment warrant requirement applies to these circumstances. As this Court has reiterated often in recent years, the Fourth Amendment protects against governmental intrusion into reasonable expectations of privacy. Principles of trespass or property rights are not relevant to Fourth Amendment analysis. Thus, while it is plain that employers have a property right in their businesses and in the locations in which work is performed by employees, and equally plain that businesses as such are not outside the protection of the Fourth Amendment, those two facts alone do not establish that an employer has a protectable expectation of privacy

as to all governmental entry onto any business location. In this instance, the employer has opened his premises for commercial purposes to certain persons—his employees. The question is whether he has retained, nonetheless, a sufficient expectation that government officials may not intrude into the very locations, and only the locations, where those employees work, for the limited purpose of protecting those employees from physical harm, under a statutory and regulatory scheme which assures that the inspection will be limited to that purpose. We do not believe the OSHA inspection scheme involves any meaningful intrusion into a legitimate expectation of privacy, and we submit that the protections contained in the statute itself are therefore sufficient under the Fourth Amendment.

The second question is whether, if the expectation of privacy is of significant dimensions, the scheme of routine, unannounced inspections which Congress prescribed is nonetheless constitutional. The court below addressed only this issue, and did so on the premise that the central problem was whether a warrant based on particularized probable cause must be obtained prior to inspection, at least if there is no consent.<sup>1</sup> Because of the difficulty of assuring uniform compliance in any other manner, routine, unannounced in-

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<sup>1</sup> This assumption was never made explicit. However, the complaint was based on the premise that no valid search could take place without "information giving [the inspectors] probable cause to believe that any violations of the Act existed upon or were occurring within plaintiff's said business premises." (App. 6; see also Complaint ¶ XIV, App. 8.) And, if the only issue were whether *some* judicial approval and notice of the inspection, evidenced in writing, is necessary, there would have been no justiciable controversy, since the suit was filed *after* an inspection pursuant to court order was attempted.

spections were contemplated by Congress and central to the statutory scheme.<sup>2</sup> But, contrary to the lower court's assumption, even if warrants were necessary, such periodic inspections could continue. For, under *Camara v. Municipal Court*, 387 U.S. 523, and *See v. Seattle*, 387 U.S. 541, the showing necessary to obtain a warrant in these circumstances would be only whether there was a rational scheme for determining which businesses are to be subjected to routine inspections. Since the Secretary would have no difficulty in demonstrating such a rational scheme, requiring warrants would not fundamentally alter the statutory in-

Further, the district court held that the OSHA inspection scheme was entirely unconstitutional; in suggesting that there are alternative means of enforcing OSHA, the court did *not* intimate that warrants could be obtained by showing the need to perform a routine inspection, rather than a reason to believe there are violations in the particular location. (Jurisdictional Statement, Appendix A, 7a-8a n. 4 (hereafter "Jur. St. App.")). Thus, the case was clearly decided on the basis that if warrants are necessary, the scheme of routine inspections cannot go forward at all.

<sup>2</sup> We note that this case does not concern inspections triggered by an employee complaint (§ 8(f), OSHA, 29 U.S.C. § 657(f)), or by any other reason to believe a violation exists at a particular locality. The Department of Labor refers to routine inspections as "regional programmed inspections;" it also conducts other kinds of inspections, based upon evaluation of complaints, knowledge of actual injuries, or as a follow-up after citation for violations. (See Occupational Safety and Health Administration, Field Operations Manual, 2 BNA Occupational Safety & Health Reporter Reference File (hereafter "Manual"), at 77:2301; 75:2501; 77:2510.) The basic considerations regarding intrusion upon protected interests would, of course, be basically the same for all the types of OSHA inspections. However, the very routine nature of programmed inspections, and the consequent lack of stigma involved, could conceivably decrease the intrusiveness of such inspections and thereby reduce the degree of protection required by the Fourth Amendment. (See *United States v. Martinez-Fuerte*, 428 U.S. 543, 559-560.)

tent. This Court should therefore, if it determines warrants are required, read the statute so as to render it constitutional.

## ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT REQUIRE THE GOVERNMENT TO OBTAIN WARRANTS IN ORDER TO CONDUCT OSHA INSPECTIONS OF AREAS WHERE EMPLOYEES WORK, FOR THE PROTECTION OF THOSE EMPLOYEES.

The Fourth Amendment "protects people from unreasonable governmental intrusions into their legitimate expectations of privacy." (*United States v. Chadwick*, — U.S. —, 45 L.W. 4797 (June 21, 1977).) Whether or not a particular kind of search involves a significant intrusion into privacy expectations is, under this formulation, relevant at two junctures. First, if there is no intrusion upon a protectable privacy interest, the Fourth Amendment inquiry is at an end. (See, e.g. *Air Pollution Variance Bd. v. Western Alfalfa*, 416 U.S. 861, 865; *G.M. Leasing Corp. v. United States*, — U.S. —, 45 L.W. 4098, 4102 (Jan. 12, 1977).) Second, the privacy interest if it exists may be minimal, either because of the nature of the location being searched or thing being seized (see, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 367; *United States v. Chadwick*, *supra*, 46 L.W., at 4800), or because of the limited nature of the intrusion. (See, e.g., *Terry v. Ohio*, 392 U.S. 1.) If so, a search or seizure may be "reasonable" which, if the intrusion were greater, would violate the Fourth Amendment.

1. To evaluate the strength of a privacy interest for Fourth Amendment purposes, the starting point is that "the Fourth Amendment protects people, not places." (*Katz v. United States*, 389 U.S. 347, 351.) Consequently, notions of property rights or trespass have no application

in the Fourth Amendment area. (*Western Alfalfa, supra*; *Hester v. United States*, 265 U.S. 57.) For, "[w]hat a person knowingly exposes to the public, *even in his own home or office*, is not a subject of Fourth Amendment Protection." (*Katz, supra*, 389 U.S., at 351 (emphasis supplied).)<sup>3</sup>

If Barlow's Inc. has a Fourth Amendment right to be free from OSHA inspections, then, neither its ownership of the building in which work is performed nor its control of the business can be the basis of that right. For example, if an OSHA inspector walked around the aisles of a department store during business hours looking for readily visible OSHA violations, clearly no Fourth Amendment search would have taken place at all. "[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—\* \* \* it becomes clear that the reach of the Amendment cannot turn on the presence \* \* \* of a physical intrusion into any given enclosure." (*Katz, supra*, 389 U.S., at 353.)

<sup>3</sup> The court below, and other courts addressing the OSHA inspection question, have viewed *Western Alfalfa* as based on an "open fields" exception to the warrant requirement. (See Jur. St. App., 9a; *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627, 631 & n.9 (D. N.Mex.); cf. *Brennan v. Gibson's Products, Inc.*, 407 F. Supp. 154, 161 (E. D. Tex.).) Taking this view, those courts assumed that the apparent obverse was also true—that is, that any health or safety inspection *inside* a building requires full Fourth Amendment protection. However, the reason why there was no Fourth Amendment violation in *Western Alfalfa* was not a special exception to the warrant requirement but, instead, that the emissions which were monitored, although observed from private property, were "knowingly expose[d] to the public" (*Katz, supra*), and there was therefore no search at all. (See *United States v. Dionisio*, 410 U.S. 1, 14; *Nixon v. Administrator of General Services*, — U.S. —, —, 45 L.W. 4917, 4926 (June 28, 1977).)

2. Ownership of a business alone, then, does not give rise to a protectable privacy interest as to all locations at which the business operates. At the same time, "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." (*See v. Seattle*, 387 U.S. 541, 543.) Thus, in some cases, all involving locked premises or offices, the Court has held that there is a privacy interest in commercial premises sufficient to necessitate a warrant. (See, e.g., *See, supra*; *G.M. Leasing Corp., supra*; cf. *Mancusi v. De Forte*, 392 U.S. 364.)

However, because of the inherent nature of commercial enterprise, the Fourth Amendment rights of the businessman and of an occupant of a private residence are not the same. "The Court \* \* \* has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context," (*G.M. Leasing Corp., supra*, 45 L.W., at 4103), and that "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." (*California Bankers Assn. v. Shultz*, 416 U.S. 21, 66-67.) Thus, "businesses may \* \* \* be inspected in many more situations than private homes." (*See, supra*, 387 U.S., at 546.; see *United States v. Biswell*, 406 U.S. 311; *Colonnade Catering Corp. v. United States*, 397 U.S. 72.)<sup>4</sup>

<sup>4</sup> In *Biswell*, a locked gun storeroom was the object of the inspection. *Colonnade Catering Corp.* involved a locked liquor storeroom; while the inspectors also visited the party room open to the public and an apparently unlocked cellar, no objection was even raised until they sought entry to the storeroom, which only the president of the company was authorized to open. (397 U.S., at 73.) In no

In explicating the situations in which business privacy is to be respected for Fourth Amendment purposes, this Court has recently dealt only with two situations. On the one hand, a businessman dealing in regulated items has been held to have "only limited justifiable expectations of privacy" (*Biswell, supra*, 406 U.S., at 316) as to locations in which he keeps those items, even if he evidences a subjective expectation of privacy as to those locations by locking them and permitting no access to anyone else.<sup>5</sup> On the other hand, if an intrusion happens to be upon a business, but is "not based upon the nature of its business, its license, or any regulation of its activities [there is] no justification for treating petitioner differently in these circumstances simply because it is a corporation." (*G.M. Leasing Corp., supra*, 45 L.W., at 4103.)

Plainly, unlike *G.M. Leasing Corp.* and *Sec.*,<sup>6</sup> this case does involve regulation of a business as such. Only persons "engaged in a business affecting commerce who has employees" are covered by the Act. (§ 3(5), 29 U.S.C. § 652 (5).) And, the statute was passed because Congress found "that personal injuries arising out of work situations im-

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case, to our knowledge, has the Court discussed Fourth Amendment rights with respect to commercial locations which are neither offices nor locked storage premises.

<sup>5</sup> For private persons, locking or closing off an area, even for a limited time, is ordinarily sufficient evidence of an intent not to expose the contents to trigger complete Fourth Amendment protection. (*Katz, supra*, 389 U.S., at 352; *Chadwick, supra*, 45 L.W., at 4800.)

<sup>6</sup> The inspection in *Sec* was a fire inspection, under a general statute permitting inspections of buildings for compliance with the Fire Code. (387 U.S., at 541.)

pose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." (§ 2(a), 29 U.S.C. § 651(a).) Congress pointed, in particular, to the fact that lack of uniform regulation of occupational health and safety made it difficult for those employers who are concerned about their employees' health to implement that concern with proper precautions. "[M]any employers \* \* \* simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so." (S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), 4.) Thus, the burden of OSHA does not fall on businesses only incidentally, but was required precisely because participation by businesses in the public marketplace creates, absent government regulation of occupational health and safety, a disincentive to self-regulation ultimately harmful to the general economy.

Not only is this statute aimed at aspects of business operations which are public, rather than private, but the inspections are aimed at the particular areas which, although they may not be open to any member of the public who seeks to enter, are open to "representatives of the public"—the employees. (*Youghioheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 50 (S. D. Ohio).) Since "employees, whose interests are protected by the Act, enter the [business premises] daily, \* \* \* [f]ederal inspectors [enforcing that Act] do not \* \* \* intrude into [a] zone of privacy which the [employers] reasonably expect to remain inviolate." (*Id.*)

The relationship between employers and their employees has long been recognized as an essentially commercial one affecting the public economy. Employers therefore, unlike individuals as regards their own homes and families, are

subject to pervasive regulation as regards their dealing with their employees.<sup>7</sup> In particular, employees and their representatives have in certain instances the right to use the employer's property over the employer's objection when necessary to exercise their statutory rights. "[T]he employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining \* \* \*." (*Republic Aviation Corp. v. Board*, 324 U.S. 793, 802 n. 8; see also *Hudgens v. NLRB*, 424 U.S. 507, 521-523.) Thus, the decision to engage in commerce and to hire employees necessarily entails a diminution of the absolute right to control entry onto and use of the employer's otherwise private premises where protection of the employees is at issue.

The significance of the public nature of the employee-employer relationship, and therefore of the location where employees work, can be seen more clearly if one considers the different considerations which would apply in other circumstances. For example, if a governmental body tried to regulate health and safety of children in their homes, by providing for routine home inspections to assure compliance with child health and safety standards, the public interest in assuring the health and safety of children would be at least as great as that in assuring that adults are not harmed while working. The relationship of children and

<sup>7</sup> See, e.g., the Fair Labor Standards Act, 29 U.S.C. 201 et seq.; the National Labor Relations Act, 29 U.S.C. § 151 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.; and the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

parents, however, is subject to substantive constitutional protection against government regulation. (See, e.g., *Moore v. City of Cleveland*, —, U.S. —, 45 L.W. 4524 (May 31, 1977).) And, health and safety inspection of homes for protection of the homes' occupants would involve governmental perusal of the most intimate aspects of daily life. We would assume, therefore, that even if the regulation was otherwise valid, particularized probable cause and a warrant would be necessary to permit inspections.

In contrast, we would expect that even in buildings which serve as residences, landlords who maintain common areas for the use of residents and their guests could not object to routine health and safety inspection of those areas:

"Inspection of the common areas of multiple-dwelling buildings infringes only the technical property interest conferred by the landlord's legal possession of these areas. Because such inspections threaten no invasion of landlord's personal privacy, the Fourth Amendment does not dictate the same careful procedures required to protect the privacy of citizens in their own houses." (Comment, *The Fourth Amendment and Housing Inspections*, 77 Yale L.J. 521, 539-540 (1970).)

This analysis would apply, we would think, to inspections for the protection of customers of areas open for commercial purposes, even though the property owner retained the right to limit entry to some degree. For example, the fact that a restaurant can set and enforce behavior and dress rules for customer, or that a theatre can admit only those who pay in advance, would not change the fact that their premises are open to the public to an extent, for commercial purposes. An inspection limited to protecting those members of the public who *are* admitted would therefore not intrude upon any legitimate expectation of privacy,

although it would intrude upon technical property rights.

3. Because he is in business and has hired employees for that purpose, then, an employer cannot have any legitimate expectation that his relationship with his employees and the area where they work will be free from governmental inspection. But, this is not to say that by hiring employees, the employer surrenders *all* reasonable expectations of privacy as to the premises where they work with respect to *every* kind of search or inspection. Rather, the compelling factor in this case, we believe, is that the scope of an OSHA inspection is exactly congruent with the degree to which and the manner in which the employer has opened his premises to others for commercial purposes. Thus, inspections are ordinarily conducted only during business hours, when employees are present (Manual, at 77:2502-2503),<sup>8</sup> and the inspection is limited to areas, materials, and machines with which employees have contact, and records directly relevant to the purpose of the inspection. (29 C.F.R. § 1903.3 (a).)<sup>9</sup>

<sup>8</sup> In those few instances in which inspections occur outside of working hours, a situation not presented by this case, the time must still be a "reasonable" one (§ 8(a)(2), OSHA); approval by the OSHA Area Director is ordinarily required; and notice may be given to the employer in advance. (Manual, at 77 :2505; see 29 C.F.R. § 1903.6.) Because many OSHA standards involve the use of protective equipment or safe procedures by employees, or the measurement of toxic substances under actual working conditions, OSHA inspectors would almost always prefer to inspect during working hours. Thus, it is likely that out-of-business hours inspections occur primarily to decrease the intrusion on the employer where the work performed is such that business-hours inspections would be too disruptive. (See 29 C.F.R. § 1903.7(d).)

<sup>9</sup> It does not appear that OSHA inspectors are empowered to physically search offices or desks to inspect records if the employer does not produce them upon request. (See § 8(e)(1), 29 U.S.C.

The reason this consideration is critical is that the Fourth Amendment protects privacy to the degree that the person seeking to avoid governmental intrusion has himself served his "right to be let alone." (*Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).)<sup>10</sup> And, the nature of certain activities or locations may be such that certain kinds of searches or inspections deal with the public or shared aspect of the activity and therefore do not implicate legitimate expectations of privacy, while others will intrude upon privacy to the extent it has been preserved.

The recent automobile search cases illustrate this principle. While this Court has recognized that automobile travel is "public" in certain ways and has therefore announced that "a diminished expectation of privacy \* \* \* surrounds the automobile," (*Chadwick, supra*, 45 L.W., at 4800), this recognition has not led to a generalized rule that Fourth Amendment protections do not apply with full force to automobiles. Rather, the degree of protection accorded has been tuned to whether the purpose and scope of the intrusion is limited to those aspects of automobile use which are public

§ 657(c)(1).) Rather, compulsory judicial process commanding production of the records is sought upon refusal. (Manual, at 77:2503.)

<sup>10</sup> For example, while "[t]he Fourth Amendment protects against governmental intrusion upon 'the sanctity of a man's home and the privacies of life' \* \* \* the occupant can break the seal of sanctity and waive his right to privacy in the premises. Plainly he does this to the extent he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him. [T]he seller cannot \* \* \* complain that his privacy has been invaded so long as the agent does no more than buy his wares." *United States v. Lewis*, 385 U.S. 206, 213 (Brennan, J., concurring). Compare *Gouled v. United States*, 255 U.S. 298. See also *United States v. Miller*, 425 U.S. 435, 442-443.

in nature. "The degree of invasion of privacy of an automobile search may vary with the circumstances." *United States v. Ortiz*, 422 U.S. 891, 898. For example, in holding that the roving Border Patrol officers may not stop cars away from the border to inspect for aliens without complying with the reasonable suspicion standard of *Terry v. Ohio*, 392 U.S. 1, the Court noted:

"Our decision in this case takes into account the special function of the Border Patrol \* \* \* [and] the character of roving-patrol stops. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway use, to be on public highways. Our decision thus does not imply that state and local enforcement agencies are without power to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters." (*United States v. Brignoni-Ponce*, 422 U.S. 873, 883 n.8; see also *id.*, at 887 (Rehnquist, J. concurring); *United States v. Ortiz*, 422 U.S. 891, 897 n.3).

Also illustrative, in a different way, are cases dealing with shared control over otherwise private premises. Where more than one person uses an area, either may consent to a search. (*United States v. Matlock*, 415 U.S. 164; *Frazier v. Cupp*, 394 U.S. 731, 740.) Since "the scope of a search that consent legitimates is congruent with the realm of privacy that the consent waives" (Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 54 (1974)), these cases illustrate that "the Constitution does not allow persons who have a privacy limited by sharing to claim a privacy beyond that limit." (*Id.*, at 59.) At the same time, just as a "search must be strictly tied to and justified by the cir-

cumstances which rendered its initiation possible" (*Terry, supra*, 392 U.S., at 19), a governmental intrusion which is not a search because limited to the shared aspects of an area must be surrounded with protections to assure that it does not intrude beyond those limits.

4. The question, then, is whether a given governmental inspection program related to certain activities is limited, by the statute or regulations governing the inspection, to intrusion upon the non-private aspects of an individual's or business' use of private property, and at the same time contains sufficient protection of the privacy rights which may exist concurrently in the same location. If so, neither a warrant nor any measure of probable cause is required to validate the inspection system, for no legitimate expectations of privacy are threatened.<sup>11</sup>

First, the scheme must assure that the inspection will be limited to those aspects of the location as to which privacy has not been retained; this can involve a spatial limitation, a temporal limitation, and a limitation upon what is dis-

<sup>11</sup> This Court has held that a warrantless search without probable cause can be "reasonable" and therefore valid under the Fourth Amendment even when there is clearly an intrusion into privacy, and has balanced the limited nature of a particular intrusion and the protections accorded by the statute in striking against the public interest in a particular search. (See, e.g., *South Dakota v. Opperman*, 428 U.S. 364; *United States v. Martinez-Fuerte*, 428 U.S. 543.) However, there is no need to apply a Fourth Amendment balancing test where the intrusion itself, and the protections accorded, are, as here, such that the legitimate privacy interests are necessarily protected by the inspection system. (See Note, *Government Access to Bank Records*, 83 Yale L.J. 1439, 1471 (1974).) If there is any intrusion into privacy here, it seems plain that it is minimal and outweighed by the need for uniform enforcement (see pp. 8-9, *supra*).

turbed or taken from the location. Here, as noted, the right to enter and inspect is limited to those areas where employees work and those machines and substances to which they are exposed. Nothing is taken from the premises except photographs of those locations and machines, and samples of those substances. (See Manual, at 77:2506-2507.) And, inspections are normally conducted during working hours.

Second, the inspection system must be set up so as not to threaten the concurrent privacy interests. For example, since the employers subject to OSHA have relinquished control over their premises only to the extent they have admitted employees and engaged in commerce, their Fourth Amendment right to be free from inspections directed toward general criminal activity, or toward civil penalties unrelated to the conduct of a business (see, e.g., *See, supra*), has been retained. OSHA contains several kinds of assurances that the intrusion will be limited to its permissible scope, and that the employer will know that it is so limited. OSHA inspectors have statutory authority *only* to inspect for OSHA violations; they are not generalized law enforcement officers.<sup>12</sup> Moreover, all covered employers are required to post notices which describe the Act generally and, in particular, state the right of OSHA inspectors, to "conduct jobsite inspections to insure compliance with the Act." (Official Occupational Safety and Health Poster, 2 BNA OSHA Reporter Reference File, at 41:1301; see 29 C.F.R. 1903.2.) Third, OSHA inspectors are required to present

<sup>12</sup> There has never been a situation, to our knowledge, in which information obtained by an OSHA inspector has been communicated to other law enforcement officials for use for other purposes, and the statute contains affirmative protection against use for certain purposes. (§ 15, 29 U.S.C. § 664.)

credentials before inspection and to outline the scope of the inspection to the employer. (Manual, at 77:2502, 2504.)<sup>13</sup> Thus, the employer is well aware of the purpose of the inspection, and of its limits, before it begins.

Finally, the scheme for selecting which locations are to be subject to routine inspections assures that impermissible motives unrelated to the purpose of the statute do not govern. The decision to inspect a particular location is made not by individual inspectors but by the Area Director. (Manual, at 77:2301.) And, the decision of the Area Director is governed by articulated principles, set out in advance, concerning coverage of certain industries and geographical locations, based on observed injury/illnesses rates. (*Id.*, at 77:2302.)

Thus, OSHA inspections intrude upon an employer's premises only to the degree that he has opened those premises to employees for commercial purposes. The purposes of the inspections are directly related to business regulation, and there are safeguards in the statute and regulations to assure that the inspections are performed only for their intended purpose and do not exceed their permissible scope. Consequently, the inspections do not intrude upon any privacy interest of the business, and no warrant is required.

## II. IF WARRANTS ARE CONSTITUTIONALLY NECESSARY, THE STATUTE SHOULD BE CONSTRUED TO REQUIRE THEM.

The court below, without engaging in any analysis what-

<sup>13</sup> The credentials "state the officer's name, identify him as a compliance officer for the Department of Labor, and paraphrase the statutory authority for his entry. The officer's photo and signature appear on the credentials." (*Usery v. Godfrey Brake & Supply Service, Inc.*, 545 F.2d 52 (C.A. 8).) An employer may make a toll-free telephone call to verify the identification. (*Id.*, at 53.)

ever of the Fourth Amendment interests at stake, concluded that this case "must be controlled by *Camara* and *See*," decisions in which warrants were required before inspectors could conduct administrative searches without consent. (Jur. St. App. 9a.) The court went on to invalidate entirely the OSHA inspection scheme. Apparently, the three-judge court believed that requiring warrants would involve such a major revision in the scheme Congress contemplated as to be impermissible, even in the face of the usual rule that statutes are, insofar as possible, to be construed to render them constitutional. (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (Brandeis, J., concurring).) It seems plain, however, that if, contrary to our analysis in Part I, the Court determines that there is a sufficient privacy interest to bring the Fourth Amendment warrant requirement into play, *Camara* and *See* would permit the Secretary to continue to enforce the statute essentially as Congress intended. The statute should therefore be construed if necessary to require an administrative warrant of the kind contemplated by *Camara* and *See*.

1. After holding that an individual may not be convicted of a crime for refusing entry to an inspector who had no warrant authorizing entry,<sup>14</sup> the Court in *Camara* and *See* went on to *reject* the proposition that in such circumstances, "warrants should issue only when the inspector possesses

<sup>14</sup> We note that we do not ascribe any significance to the fact that *Camara* and *See* both concerned prosecution for refusal to enter, while this case does not. Although the present practice of the Secretary is to obtain court orders if entry is refused by the employer, this regulation may not be required by the Act, which may permit civil penalties and, does, in some circumstances, provide criminal penalties, for resisting entry. (See §§ 17(a), 17(h), 29 U.S.C. §§ 666(a), 666(h); see also 18 U.S.C. § 111.)

probable cause to believe that a particular dwelling contains violations of the \* \* \* standards prescribed." (*Camara*, 387 U.S., at 534; see also *See*, 387 U.S., at 545.) Rather, the Court held that since,

"[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous \* \* \* the need for the inspection must be weighed in terms of these reasonable goals of code enforcement [and] 'probable cause' to issue a warrant [therefore] must exist if *reasonable legislative or administrative standards* for conducting an area inspection are satisfied with respect to a particular dwelling." (*Camara*, 387 U.S., at 535, 538 (emphasis supplied); see also *See*, 387 U.S., at 544-545.)

Thus "the judicial function envisioned in *Camara* did not extend to reconsideration of the basic agency decision to canvas an area," (*Almeida-Sanchez*, 413 U.S., at 283 (Powell, J., concurring)), and no individualized suspicion whatever is required to justify a warrant under the circumstances presented in *Camara*. (See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561.)

There is no reason to suppose that any higher standard of individualized cause is required for OSHA inspections than for municipal building code inspections of either residences or commercial premises. Just as the governmental interest at stake in *Camara* and *See* was based on the effect of one person's use of property upon the use of others and therefore required uniform compliance, so OSHA is premised upon a similar Congressional finding that "the chemical and physical hazards which characterize modern industry are not the problem of a single employer, a single industry, or a single state jurisdiction. The spread of industry and the mobility of the workforce combine to

make the health and safety of the worker truly a national concern." (S. Rep. No. 91-1282, 91st Cong., 2d Sess., (1970), 4.)

Similarly, as in *Camara*, "the only effective way to seek universal compliance \* \* \* is through routine periodic inspections \* \* \*." (387 U.S., at 536.) Congress obviously so determined, for it authorized entry "without delay," (§ 8 (a) 29 U.S.C. § 657(a)), created sanctions for advance notice of inspections (§ 17(f) 29 U.S.C. § 666(f); see also § 2(b)(10), 29 U.S.C. § 651(b)(10)), and required states to establish "a right of entry and inspection of all workplaces subject to the Act" before they could be permitted to assume enforcement of OSHA standards (§ 18(b)(3), 29 U.S.C. § 667(b)(3)). While Congress recognized that "the number of inspections which it would be desirable to have made will undoubtedly, for an unforeseeable period, exceed the capacity of the inspection force" (S. Rep. No. 91-1282, *supra*, at 12) and therefore gave the Secretary the right to require self-inspection (*id.*; see § 8(c)(1), 29 U.S.C. § 657(c)(1)), this possibility was viewed as a "supplement to the Secretary's own inspections \* \* \* between official inspections." (S. Rep. No. 91-1282, *supra*, at 12.) This insistence upon routine inspection authority was obviously justified, for, as in *Camara*, many conditions subject to regulation "are not observable from outside the building and indeed may not be apparent to the inexperienced [employer or employees themselves]." (387 U.S., at 537.)

Moreover, the analysis in Part I, *supra*, surely demonstrates that if the *Camara* and *See* searches involved "a relatively limited invasion of \* \* \* privacy" (*Camara*, 387 U.S., at 537), the invasion of privacy here is even more limited, if it exists at all. *Camara* involved a residential in-

spection; protection against governmental intrusions into homes is at the core of the Fourth Amendment. *See* involved a search of a locked warehouse accessible only to the owner, rather than an area into which employees come and go. And, OSHA contains assurance that the inspection will not exceed its proper bounds (see pgs. 15-17, *supra*), while the statutes in *Camara* and *See* contained no such protections. (See *Camara*, 387 U.S., at 526 & nn 1 & 2; *See*, 387 U.S., at 541 & n. 1.)

2. This Court has not had occasion, in *Camara* or *See* or any subsequent case, to delineate in other than general terms what kind of a showing must be made to a magistrate or judge to substantiate a warrant to conduct a periodic inspection. The general standards enunciated in *Camara* and *See*, and their application by lower federal courts, do, however, make clear that the standards for deciding upon routine inspections already used by the Secretary, albeit outside of a warrant procedure, would suffice to justify a warrant if presented to a magistrate or judge.

The standards enunciated by this Court for issuance of warrants for administrative searches begin with the principle that "[t]he agency's particular demand for access will of course be measured \* \* \* against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." (*See, supra*, 387 U.S., at 545.) The function of the magistrate in applying this principle is not to "review . . . policy matters" by a *de novo* appraisal of "legislative or administrative assessment of broad factors," but, instead, to determine whether the legislative or administrative standards are "reasonable [and] satisfied with respect to a particular [location]." (*Camara, supra*, 387 U.S., at 532,

538.) Enunciating the application of this principle to the municipal building code enforcement at stake in *Camara*, the Court noted that:

"Such standards \* \* \* may be based upon the passage of time, the nature of the building \* \* \* or the condition of the entire area, but they will not necessarily depend upon the condition of the particular dwelling." (387 U.S., at 538)

The lower federal courts have had occasion, under statutes which expressly provide for a *Camara*-type warrant or were construed, after *Camara*, to require such a warrant, to review particular warrants for consistency with the *Camara/See* standards. For example, in *United States v. Goldfine*, 538 F.2d 815 (C.A. 9), a search was conducted under a warrant<sup>15</sup> obtained pursuant to § 510 of the Comprehensive Drug Abuse Prevention & Control Act of 1970, 21 U.S.C.

<sup>15</sup> The warrant read as follows:

"1. The above establishment is a pharmacy registered by and with the federal government to obtain, deliver and possess controlled substances pursuant to federal regulations.

2. This establishment has not been previously inspected.

3. The proposed inspection is undertaken to determine whether the establishment is conducting its business in controlled substances in compliance with the statutes and regulations under which it is authorized to do business.

4. The inspection will be conducted within regular business hours and in a manner designated by Title 21 U.S.C. § 880 and Title 21 C.F.R., Part 316.

5. The inspection will extend to the establishment and all pertinent equipment, containers, and records, as specified in Title 21 U.S.C. § 880.

6. Samples will be collected when necessary to reasonable inspection and receipt will be given therefor.

7. A return will be made to the Court upon completion of the inspection." (*Goldfine*, 538 F.2d, at 818 n.2.)

§ 880. That statute was passed after *Camara* and *See* and incorporated the definition of "probable cause" articulated in those cases:

"For the purpose of this section, the term 'probable cause' means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant." (21 U.S.C. § 880(d); see 21 C.F.R. § 316.)

The court determined that the warrant under review was more than sufficient to conform to the *Camara* principles. (538 F.2d, at 819).

Thus, the *Goldfine* court held that a demonstration that the establishment inspected is covered by the statute,<sup>16</sup> has not been previously inspected, and was inspected solely to determine compliance with a particular statute is sufficient. See also *United States v. Montrom*, 345 F. Supp. 1337 (D. Pa.), *aff'd*, 480 F.2d 918, 919 (C.A. 3); *United States v. Greenberg*, 334 F. Supp. 364 (D. Pa.). Similarly, in *United States v. Blanchard*, 495 F.2d 1329 (C.A. 1), the court, applying *Camara*, held that a warrant, issued under a statute construed after *Camara* to require a warrant, was sufficient where it was based on the assertion that "no

<sup>16</sup> Because OSHA covers only employers "engaged in a business affecting commerce who [have] employees" (§ 3(5)), 29 U.S.C. § 652(5), there may in a few instances be a question whether the establishment to be inspected is indeed covered by the Act. See *Matter of Restland Memorial Park*, 540 F.2d 626 (C.A. 3). The function of the magistrate, however, would not be to determine whether any particular establishment is covered by the Act, but whether there is probable cause to believe it is; the merits of coverage could then be decided in enforcement proceedings. (*Id.*)

inspection of the defendants' premises had previously been made within the past twelve months." (495 F.2d, at 1331.)

Certainly, the Secretary could satisfy with respect to routine inspections the standard outlined in *Camara* and applied in *Goldfine* and *Blanchard*, were he given the opportunity. Mere passage of time or the fact that an establishment has not been previously inspected is apparently sufficient. Given the fact that OSHA has far fewer inspectors than the number it would need to guarantee inspection of all covered premises even once in ten years (see, e.g., 5 BNA Occupational Safety and Health Reporter 125 (June 26, 1975)), the Secretary could surely show, with respect to many establishments to be covered in a routine inspection, that they have not been inspected at all, or have not been inspected recently.

Further, the Secretary has endeavored to link frequency of inspection with the degree of hazard in particular industries, and the number of employees exposed. (Manual, at 77:2302.) Consideration of such factors is precisely analogous to consideration, in the *Camara* context, of the "nature of the building (e.g. a multi-family apartment house), or the condition of the entire area" (387 U.S., at 538), for it links inspection to the basic purposes of the statute—protecting as many people as possible from occupational injury or illness. Thus, the current "administrative standards . . . for conducting an [OSHA] inspection" (*Camara*, 387 U.S., at 538) are clearly reasonable, and the Secretary could obtain a warrant by showing that those standards "are satisfied with respect to a particular [business]." (*Id.*)<sup>17</sup>

<sup>17</sup> The statute and regulations also contain adequate assurances that the scope of the search will be reasonable (see pp. 15-17, *supra*), and could be paraphrased in the warrant so that the employer will have notice of the limits on the inspection.

3. This case does differ in one significant respect from *Camara* and *See*, as regards the obtaining of warrants. Congress, with justification, did insist that inspections must ordinarily be without advance notice. (See p. 20, *supra*.) Thus, the observance of the admonition in *Camara* that "it seems likely that warrants should normally be sought only after entry is refused" (387, U.S., at 539) would seriously compromise the inspection scheme.

The Court in *See*, however, specifically recognized that "since surprise may often be a crucial aspect of routine inspections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved." (387 U.S., at 545 n.6.) Since the "nature of the regulation" here does necessitate surprise, to avoid short-term correction of work practices or physical hazards which do not represent the usual condition of the premises, obtaining warrants *ex parte* in advance ought to be permitted. Also, the particularity of description of the property to be inspected would then be limited to that which can be known in advance of physical perusal of the premises.

Obtaining warrants in advance of all routine inspections might, of course, constitute a serious administrative burden on the Secretary. However, we do not believe the burden would be such as to *fundamentally* alter the scheme Congress intended to implement. Inspection decisions are currently made in advance of the date of inspections, and scheduled by the Area Director (Manual, at 77:2301, 2501); the decision is made on the basis of certain information the Secretary collects regularly. (*Id.*, at 2302.) We assume that the work schedule and the pertinence of the applicable standards for inspection to each location is already evi-

denced by memoranda or forms; if not, they could be. Thus, obtaining warrants would require adding to the current scheduling system an affidavit in appropriate form for each establishment to be inspected on a given day and presenting groups of such affidavits to a magistrate or judge on a regular basis—once a week, for example.

4. Since the basic elements of the OSHA inspection scheme—periodic, surprise inspection with concentration upon particularly hazardous or large industries—could be conducted within the *Camara/See* framework if constitutionally necessary, this Court would not, as the lower court believed, have to “judicially redraft an enactment of Congress” (Jur. St. App. 10a) in order to interpret the Act to require warrants.

“[U]nder familiar principles of constitutional adjudication, [this Court’s] duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment.” (*Almeida-Sanchez, supra*, 413 U.S., at 272.) While Congress was insistent that the inspections be conducted routinely and without advance notice and may well have contemplated that they could be conducted without warrants, neither the language of the statute nor the legislative history *specifically* require that the inspections be without warrants. Indeed, one of the principal authors of the Act noted expressly that “in carrying out inspection duties under this act, the Secretary, of course, would have to act in accordance with applicable constitutional protections.” (Legislative History, *supra*, at 1077 (remarks of Rep. Steiger).) Thus, if “to give the statute [the] reading [that no warrants are required] would call its constitutionality into serious question,” the Court should “decline to read it as [permitting] \* \* \* war-

rantless invasions of privacy.” (*G.M. Leasing Corp., supra*, 45 L.W., at 4104.) Instead, the Court should read the statute as authorizing entry but silent on the question of whether warrants are to be obtained, and assume that Congress intended conformity with whatever the Fourth Amendment requires with respect to warrants.

The disposition of this case follows from the above analysis. While “it is undisputed that [the OSHA inspector] did not have any cause, probable or otherwise, to believe a violation existed” (Jur. St. App. 2a), it appears that neither the court which issued the inspection order nor the three-judge court which decided the constitutional question ever inquired into whether the Secretary could demonstrate, as *Camara* requires, not particularized cause but a reasonable scheme, applicable to Barlow’s, Inc., for conducting routine inspection. It seems clear that the Secretary could justify this inspection on *Camara* grounds, and should, if such is constitutionally required, be given the opportunity, upon remand, to do so.

**CONCLUSION**

For the reasons stated above, the decision of the three-judge court should either be reversed outright on the ground that no warrant is required, or reversed and remanded to give the Secretary the opportunity to make the showing required to obtain a warrant.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-1143**

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
*Appellants,*

vs.

BARLOW'S, INC.,  
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO.

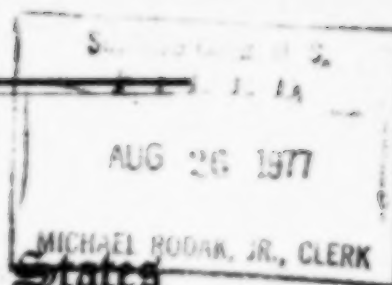
**AMICUS CURIAE BRIEF OF AMERICAN FARM  
BUREAU FEDERATION IN SUPPORT  
OF APPELLEE.**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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---

**AMICUS CURIAE BRIEF OF AMERICAN FARM  
BUREAU FEDERATION IN SUPPORT  
OF APPELLEE.**

---

The American Farm Bureau Federation hereby respectfully submits this amicus curiae brief. Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consent has been filed with the Clerk of this Court.

**INTEREST OF AMICUS CURIAE.**

The American Farm Bureau Federation (hereinafter referred to as "Farm Bureau") of 225 Touhy Avenue, Park Ridge, Illinois 60068, is the world's largest voluntary general farm organization, representing more than two and one-half million

member families in all the states (except Alaska) and Puerto Rico. Farm Bureau was organized in 1919 under the "General Not For Profit Corporation Act" of Illinois for the purpose of promoting, protecting and representing the business, economic, social and educational interests of farmers and ranchers in the United States.

The interest of Farm Bureau in this case emanates from the effect of the inspection provisions of the Occupational Safety and Health Act of 1970, 29 U. S. C. 657(a), on Farm Bureau members in Idaho and throughout the country. Well over a majority of all farm and ranch operators maintain their private homes as part of the agricultural premises which may be subject to inspection and regulation under the Act.

Farm Bureau and its members desire to preserve the Fourth Amendment constitutional right to be secure against unreasonable searches and seizures.

#### NATURE OF THE CASE.

This case challenges the constitutionality of Section 8(a) of the Occupational Safety and Health Act, 29 U. S. C. 657(a), which authorizes the Secretary of Labor to conduct inspections of workplaces. The Act, 29 U. S. C. 651 *et seq.*, regulates virtually all businesses affecting commerce for the purpose of promoting safety and health.

On December 30, 1976, a three-judge federal district court in Boise, Idaho declared Section 8(a) of the Occupational Safety and Health Act unconstitutional and enjoined the Secretary from conducting inspections under such Section. *Barlow's, Inc. v. Usery*, 424 F. Supp. 437. On January 25, 1977, the United States Supreme Court, by order of Justice Rehnquist, stayed the three-judge court order to the extent that the order restrained the Secretary's conduct outside of the District of Idaho. On February 3, 1977, this Court, by opinion and order

of Justice Rehnquist, further stayed the three-judge order to the extent that the order affects persons other than the appellee. This Court noted Probable Jurisdiction on April 18, 1977.

#### ARGUMENT.

#### **Section 8(a) of the Occupational Safety and Health Act Is Unconstitutional as Being Violative of the Fourth Amendment to the U. S. Constitution by Authorizing Warrantless Inspections of an Employer's Property.**

##### **A. The Decisions of the Court and Other Federal Precedent Preclude Warrantless Inspections of Work Premises Under the Occupational Safety and Health Act.**

Section 8(a) of the Occupational Safety and Health Act (OSHA), 29 U. S. C. 657(a), provides that the Secretary of Labor may "enter without delay" for the purpose of conducting health and safety inspections under the Act. 29 U. S. C. 657(a) provides:

"(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

The provision does not require the Secretary to first obtain a search warrant based on probable cause or to explain that

a search need not be conducted over the objection of the party being inspected.<sup>1</sup>

This Court has held in two instances that an objected-to search of property for the purpose of enforcing health and safety measures without a search warrant violates the Fourth Amendment to the U. S. Constitution.<sup>2</sup> *Camara v. Municipal Court*, 387 U. S. 523; *See v. City of Seattle*, 387 U. S. 541.

1. U. S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, Chapter V, Section D.1.c.(1) and (2), CCH Employment Safety and Health Guide ¶ 4330.4 (1976) provides:

"c. Refusal to permit inspection.

(1) General.

Section 8 of the Act provides that CSHO's may enter without delay and at reasonable times any establishment covered under the Act for the purpose of inspecting with reference to safety and health standards issued under the Act.

(2) Refused entry or inspection.

When a CSHO encounters a refusal to permit entry upon presenting proper credentials or an employer allows him to enter but refuses to permit an inspection, the CSHO should tactfully advise the employer that the Act (Section 8(a)) provides for an inspection and should endeavor to ascertain the reason for such refusal. If the employer persists in his refusal the CSHO shall advise him as follows: 'Due to your refusal to comply with Section 8(a) of the Occupational Safety and Health Act of 1970 I will be compelled to seek appropriate legal process to order your compliance.' The CSHO will then leave the premises and immediately report to the Area Director, who shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action."

2. The Fourth Amendment to the U. S. Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Affirmed in *Air Pollution Variance Board v. Western Alfalfa Corporation*, 416 U. S. 861. The factual circumstances in *Camara, supra*, and *See, supra*, are not significantly different from those in this case: (1) Residential or business property alike is being subjected to government inspection without compliance with a warrant procedure to protect legitimate security and privacy interests; (2) probable cause that there has occurred a violation of law is not present; and (3) failure to permit inspection subjects the resident or businessman to being convicted of a crime or held in contempt of court.

In commenting on the warrantless inspection system in *Camara, supra*, 387 U. S. at 532-533, Justice White, writing for the majority, stated: "The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."

The privacy and security interests protected in *Camara, supra*, and *See, supra*, are of equal or greater importance to the well-being of the millions of farmers, ranchers and other employers<sup>3</sup> who are faced with the warrantless inspection system of OSHA. In the case of agricultural operations, the farm or ranch operator has traditionally maintained a private residence on the agricultural premises.<sup>4</sup> In such instances, the

3. OSHA applies to over 6 million workplaces. See *Barlow's, Inc. v. Usery*, 424 F. Supp. 437 at 440.

4. According to the 1969 Census of Agriculture, 81.2 percent of the U. S. farm operators reporting residence reported that they lived on the farm premises. The same statistic for census years prior to 1969 is reported as follows:

Year	Percent
1964.....	90.5
1959.....	92.4
1954.....	93.8
1950.....	94.9
1945.....	94.2
1940.....	94.6

(Footnote continued on next page.)

OSHA inspector may attempt to exercise discretion to determine whether the residential structure is also subject to inspection, depending in part on whether such structure is a place where work is performed. See 29 U. S. C. 652(5) and 657. By regulation, the Secretary has exempted coverage of domestic household employment. 29 C. F. R. 1975.6. And yet temporary residential housing in labor camps is specifically covered. 29 C. F. R. 1910.142.<sup>5</sup> Clearly, a warrant procedure would substantially promote the privacy and security interests of affected farmers, ranchers and other employers.

Recently, the Court has stressed that the Fourth Amendment protects business premises and corporations. *G. M. Leasing Corporation v. United States*, ..... U. S. ...., 97 S. Ct. 619. Even more recently, the Court held that Fourth Amendment privacy interests extend to a locked footlocker seized by federal narcotic agents at a railroad station. *United States v. Chadwick*, ..... U. S. ...., No. 75-1721, decided June 21, 1977.

As stated in the dissenting opinion in *Frank v. State of Maryland*, 359 U. S. 360 at 382:

"We live in an era 'when politically controlled officials have grown powerful through an ever increasing series of minor infractions of civil liberties [cite omitted].' One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements."

(Footnote continued from preceding page.)

The number of farm operators is considered in the census to be the same as the number of farms. U. S. Dept. of Commerce, Social and Economic Statistics Administration, Bureau of the Census, 1969 Census of Agriculture, Chapter 3, Vol. II, Part 3, pp. 170-174.

5. 29 C. F. R. 1975.4(b)(2) provides:

"Any person engaged in an agricultural activity employing one or more employees comes within the definition of an employer under the Act, and therefore, is covered by its provisions. However, members of the immediate family of the farm employer are not regarded as employees for the purposes of this definition."

To protect Fourth Amendment rights against arbitrary government intrusion, a number of federal courts have held that the Secretary cannot conduct an objected-to inspection under Section 8(a), 29 U. S. C. 657(a), without obtaining a search warrant based on probable cause. *Brennan v. Gibson's Products, Inc. of Plano*, 407 F. Supp. 154; *Dunlop v. Hertzler Enterprises*, 418 F. Supp. 627; *Usery v. Rupp Forge Co.*, N. D. Ohio, No. C-76-385, decided April 22, 1976; and *Usery v. Centrif-Air Machine Co.*, 424 F. Supp. 959.

In reliance on *Camara v. Municipal Court*, *supra*, and *See v. City of Seattle*, *supra*, the court in *Gibson's Products*, *supra*, 407 F. Supp. at 157, stated: "These authorities and others cited below convince us that facially the inspection provisions of OSHA amount to just such an attempt at a broad partial repeal of the fourth amendment as is beyond the powers of Congress. Only a construction of them as enforceable solely by resort to some form of administrative search warrant such as *Camara* contemplates . . . can save these provisions."

In spite of substantial judicial precedent against warrantless OSHA inspections, only the decision of the three-judge court below has recognized that Section 8(a) must be invalidated as unconstitutional.<sup>6</sup>

"While we adopt, in general, the similar reasoning employed there [*Gibson's Products*], we decline the invitation to judicially redraft an enactment of Congress. Unlike the *Gibson's Products* court, we cannot accept the proposition that the language of the OSHA inspection provisions envision [sic] the requirement that a warrant be obtained before any inspection is undertaken. Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures

6. Warrantless inspections under state occupational safety and health laws similar to Section 8(a) of OSHA have been invalidated as unconstitutional by state courts. See *Alaska Truss & Millwork v. State of Alaska*, No. 2903, decided June 2, 1977 (Alaska S. Ct.); and *Yocom v. Burnette Tractor Company, Inc.*, No. CA-366-MR, decided May 27, 1977 (Kentucky Court of Appeals).

under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty." *Barlow's, Inc. v. Usery, supra*, 424 F. Supp. at 441.

The court in *Gibson's Products, supra*, 407 F. Supp. at 163, had substantial reservations in allowing Section 8(a) to stand, recognizing that such an approach is "subject to criticism as remedial to the verge of redrafting." In attempting to justify its failure to strike down the OSHA inspection provision, the court in *Gibson's Products, supra*, 407 F. Supp. at 162, relied on a purported "inspection warrant" requirement in the OSHA Compliance Operations Manual<sup>7</sup> and referred to the phrase "compulsory process" in the Secretary's regulations. See 29 C. F. R. 1903.4. In spite of such intermediate administrative guidelines, the position of the Secretary in *Gibson's Products, supra*, 407 F. Supp. at 157, and in the case below, is that the language of Section 8(a) permits inspection without obtaining a warrant based on probable cause. In addition to the position of the Secretary, there is no substantial legislative history indicating that Congress intended other than a warrantless inspection system.<sup>8</sup>

7. The OSHA Compliance Operations Manual (January, 1972), cited in *Brennan v. Gibson's Products, Inc. of Plano*, 407 F. Supp. 154, at 156, n. 4, was revised in November, 1975, CCH Employment Safety and Health Guide ¶ 4251 (1976).

8. Senate Report No. 91-1282, 91st Cong., 2d Sess., U. S. Code, Cong. & Admin. News 1970, page 5187, states:

"In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment covered by this act, to inspect and investigate within reasonable limits all pertinent conditions, and also to privately question owners, operators, agents or employees."

Both the actions of the Secretary and the Congressional purpose behind Section 8(a) require that such section be invalidated as unconstitutional. If the words of a statute or its legislative history make it indisputably clear that Congress intended a result that is unconstitutional, the statute must be invalidated. *Buckley v. Valeo*, 519 F. 2d 821 at 878, affirmed in part and reversed in part, 424 U. S. 1; *United States v. Thompson*, 452 F. 2d 1333 at 1341.

**B. The Occupational Safety and Health Act Does Not Constitute the Kind of "Pervasive Regulation" Which Justifies Warrantless Inspections.**

As a narrow exception to the warrant requirement, this Court has allowed warrantless administrative searches in instances when such searches were conducted pursuant to a business licensing statute. *United States v. Biswell*, 406 U. S. 311; *Colonnade Catering Corp. v. United States*, 397 U. S. 72. Both cases, involving the federal regulation of the firearms and liquor industries respectively, permitted warrantless entry in view of the historical regulation of the businesses, the urgent federal interest being furthered, the diminished expectation of privacy, and the difficulty in detecting violations of the law. *United States v. Biswell, supra*, 406 U. S. at 315-317.

The judicial guidelines allowing warrantless entry in regulation of firearms and liquor, and again in the regulation of coal mining, *Youghioghenny and Ohio Coal Company v. Morton*, 364 F. Supp. 45, are inapplicable to the OSHA regulatory scheme.

OSHA is not a special licensing law with which a businessman must comply as a condition of engaging in business. Therefore, it cannot be said that an employer selected his business knowing full well that he would thereby be subject to warrantless inspections, as was the case with the firearms dealer in *Biswell, supra*, 406 U. S. at 316. See *Brennan v. Gibson's Products, Inc. of Plano, supra*, 407 F. Supp. at 159 and 160.

Unlike the federal licensing laws, OSHA regulates every business and every working man and woman.<sup>9</sup> OSHA extends to both hazardous and relatively nonhazardous businesses, regardless of existing state or federal health and safety regulation. OSHA covers small and large employers, many of which have higher privacy expectations than others.

In enacting OSHA, Congress did not provide a regulatory scheme immediately and specifically intended to deal with occupational safety and health hazards of emergency proportions. To the contrary, OSHA is an attempt to codify the preexisting common law duty for an employer to refrain from being negligent. As stated in the Senate Report No. 91-1282, 91st Cong., 2d Sess., U. S. Code, Cong. & Admin. News 1970, page 5186:

"Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a), in providing that employers must furnish employment 'which is free from recognized hazards so as to provide safe and healthful working conditions,' merely restates that each employer shall furnish this degree of care."

9. 29 U. S. C. 652(5) defines "employer" as:

"... a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State."

29 U. S. C. 652(3) defines "commerce" as:

"... trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof."

Also see 29 C. F. R. 1975.

In addition to the general duty clause, 29 U. S. C. 654(a)(1), referred to in the Senate Report No. 91-1282, *supra*, OSHA imposes on businesses a conglomeration of general occupational safety and health standards, 29 U. S. C. 655(a) and (b), many of which were promulgated by national standards organizations and various industrial and professional groups prior to enactment of OSHA.<sup>10</sup>

Considering the generalized approach for promoting occupational safety and health and the lack of Congressional findings that dangerous and hazardous conditions exist in a majority of the millions of individual businesses regulated, OSHA is visibly not characteristic of the kind of pervasive regulation which justifies a wholesale repeal of the Fourth Amendment.

### C. Inspections Without a Search Warrant Are Not Necessary to Avoid Frustrating the Purpose of the Occupational Safety and Health Act.

Although warrantless inspections may be administratively expedient under OSHA, such inspections are not a prerequisite for achieving effective compliance with the law. In the liquor and firearms industries, *United States v. Biswell, supra*, and *Colonnade Catering Corp. v. United States, supra*, warrantless inspections were partly justified because of the difficulty in discovering violations which could be readily concealed during the time required to obtain a warrant after initial inspection contact. In contrast, many of the potential violations under OSHA are not easily concealed or corrected. For instance, under housing standards for farm labor, specifications are set forth for size of rooms, construction materials, kitchen equipment, floor elevation, number of water outlets, and water pressure. 29 C. F. R. 1910.142. Under standards for roll-over protective structures, tractors must be provided with special roll-over structures which conform to certain performance re-

10. See Senate Report No. 91-1282, 91st Cong., 2d Sess., U. S. Code, Cong. & Admin. News 1970, page 5182.

quirements. 29 C. F. R. 1928.51(b)(1). In regulating anhydrous ammonia, standards set forth design, construction, location, installation and operation features. 29 C. F. R. 1910.111.

Healthful and safe working conditions are not implemented in 24 or even 48 hours. Such conditions are developed by long-range planning and often involve substantial monetary investment. To help achieve this end, the Small Business Act, 15 U. S. C. 631, *et seq.*, was amended to make loans to small business concerns for the purpose of meeting the requirements of OSHA. 15 U. S. C. 636.<sup>11</sup>

The effectiveness of routine unannounced inspections in achieving compliance with the Act will nevertheless continue even if a search warrant can be demanded by an employer. With or without a warrant requirement, an employer will not necessarily know whether an OSHA inspector has obtained a search warrant prior to initial inspection contact.

Nor does the requirement that a search warrant be obtained prior to inspection obviate Congressional prohibition against advance notice of an OSHA inspection. See 29 U. S. C. 651(10). Advance disclosure of an inspection largely depends on the discretion of the Secretary and his agents. Any person who gives advance notice of an inspection without proper authority may be punished by fine and imprisonment. 29 U. S. C. 666(f).

In spite of the advance notice prohibition in 29 U. S. C. 651(10) and 666(f), the Secretary has already authorized advance notice of inspections in the following situations: (1) In cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible; (2) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection; (3) where necessary to

11. The Small Business Act, 15 U. S. C. 631, *et seq.*, was amended by Pub. L. 93-237 to finance structural, operational and other changes required by OSHA and other federal laws.

assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection; and (4) in other circumstances where the Area Director determines that the giving of advance notice would enhance the probability of an effective and thorough inspection. 29 C. F. R. 1903.6.

Other compliance-related provisions of OSHA which are unaffected by a warrant requirement include the employee inspection request provisions whereby an employee may report violations to the Secretary, 29 U. S. C. 657(f)(1) and (2); the employer reporting and posting provisions by which an employer must maintain and post records of occupational illnesses and injuries, 29 U. S. C. 657(c)(1), (2) and (3); and civil and criminal penalty provisions prescribing substantial fines and imprisonment, 29 U. S. C. 666.

Left unchallenged, Section 8(a) of OSHA creates a "roving commission" of OSHA compliance officers with blanket inspection authority beyond reason and necessity. *Brennan v. Gibson's Products, Inc. of Plano*, *supra*, 407 F. Supp. at 162. Inspectors are not currently required under Section 8(a) to conduct investigations based on the likelihood of violations. Such broad discretion results in many needless searches, which will not, in fact, promote the purpose of OSHA. The unfortunate effect is the curtailment of Fourth Amendment rights. As stated by Justice Jackson in the dissenting opinion of *Brinegar v. United States*, 338 U. S. 160 at 180: "Among deprivation of rights, [Fourth Amendment rights] none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

**CONCLUSION.**

The judgment of the three-judge district court declaring Section 8(a) of the Occupational Safety and Health Act unconstitutional should be affirmed.

Respectfully submitted,

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August, 1977.

Supreme Court, U. S.  
**FILED**

SEP 23 1977

MICHAEL RODAK, JR., CLERK

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1977

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NO. 76-1143

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RAY MARSHALL, SECRETARY OF LABOR,  
ET AL.,

Appellants

VERSUS

BARLOW'S, INC.

---

On Appeal from the United States District Court  
For the District of Idaho

---

BRIEF FOR THE AMERICAN CONSERVATIVE  
UNION AS AMICUS CURIAE

---

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## SUPREME COURT OF THE UNITED STATES

NO. 76 - 1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.  
Appellants

versus

BARLOW'S INC.,  
Appellee

On Appeal from The United States District Court  
For the District of Idaho

BRIEF FOR THE AMERICAN CONSERVATIVE UNION  
AS AMICUS CURIAE

This brief *amicus curiae* is filed in support of the position of appellee by the American Conservative Union with the consent of the parties, as provided by Rule 42 of the Rules of this Court.

## INTEREST OF THE AMICUS CURIAE

The American Conservative Union is a public interest group with more than 100,000 members and 40 state affiliate organizations. Its members subscribe to the philosophy of Thomas Jefferson that that government which governs least, governs best. Since its foundation in 1964 it has been recognized as a strong advocate of constitutional government.

Warrantless inspections under the Occupational Safety and Health Act of 1970 (OSHA) - present a significant con-

stitutional question. In urging this appeal the Secretary of Labor seeks to abolish the Fourth Amendment rights of virtually every place of business in this nation.

We therefore take this opportunity to present to the Court our view that the guarantees of the Fourth Amendment prohibit warrantless OSHA searches.

### INTRODUCTION AND SUMMARY OF ARGUMENT

The Occupational Safety and Health Act of 1970<sup>1</sup> is probably the most controversial piece of legislation enacted in the last quarter of a century.<sup>2</sup>

OSHA coverage is comprehensive. It includes virtually every employer in the country. No other piece of federal legislation so extensively and pervasively involves itself in the affairs of American private industry.<sup>3</sup>

1. 29 USC §651-78 (1970). The inspection provisions (§8(a)) are set out in full in Appendix A

2. Comment, "OSHA v The Fourth Amendment: Should Search Warrants be Required For 'Spot Check' Inspections?" 29 Baylor L. Rev. 283 (1977); Comment, "Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures", 84 Yale Law Journal 1380 (1975).

3. *Practising Law Institute, Occupational Safety and Health Act: Trends and Developments* 9 (M. Stokes ed. 1974). See also Robbins, "Truth and Rumor About OSHA," 33 Fed. B.J. 149, (1974). There the author observed, "OSHA coverage is comprehensive. Virtually every private employer, except those specifically excepted by virtue of coverage under other legislation and those who are self-employed, is included." As one Senator has observed, OSHA applies to "every business affecting commerce in the entire United States, ranging anywhere from a big steel company to a shoeshine shop." 116 Cong. Rec. 36,509 (1970) (remarks of Senator Dominick). At page 15 of his brief the Secretary states the Act covers "nearly five million work-places."

OSHA's arrogant and gestapo-like actions have aroused the concern of legislators, courts and commentators, and have incurred the hostility of employers and businessmen nationwide. Agency representatives have told employers "we don't give a damn about your constitutional rights. As far as we are concerned, you don't have any because you are in business."<sup>4</sup>

Given the breadth of the Occupational Safety and Health Act and its potential for serious abuse, the preservation of individual rights demands strict adherence to the requirements of the fourth amendment. The warrant requirement of the Fourth Amendment applies to OSHA inspections and should not be swept aside simply for the convenience of the Secretary. As this Court has pointed out, administrative inspections are "unreasonable" under the Fourth Amendment unless authorized by valid search warrant. *Camara v. Municipal Court*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967).

Numerous federal and state courts have considered the question of OSHA inspections and have overwhelmingly concluded that warrantless OSHA searches do not comply with Fourth Amendment standards and cannot be countenanced.

The Secretary's arguments concerning the need for and

4. In *Dunlop v. Hertzler Enterprises Inc.*, 418 F.Supp. 627 (1976), discussed infra, OSHA not only attempted an inspection of Hertzler's business, but of his adjacent home as well because his employees kept their lunches there in his refrigerator. The above statement was made by the Area Director when Hertzler inquired as to his constitutional rights. Hertzler is not an isolated incident.

reasonableness of warrantless OSHA inspections are belied by the Act itself, the legislative history of the Act, the Secretary's own procedures, and actual experience. The requirement for a warrant -- issued on a showing of probable cause -- has not and will not prevent effective enforcement of the Act.

## ARGUMENT

### I. HISTORY OF THE FOURTH AMENDMENT

The right against searches of home and property dates back to Old Testament times. Freedom from warrantless and unreasonable searches was recognized by the Romans. English Law precedents against warrantless searches predate Magna Carta.<sup>5</sup>

In the Seventeenth Century writings of such authorities as Sir Edward Coke and Chief Justice Hale, the chief limitations upon the exercise of search and seizure now embodied in such Constitutional provisions as the Fourth Amendment are already found presented either as law or as recommendations of the better practice, which later hardened into law.<sup>6</sup>

The great debate in Seventeenth Century England concerned the legality of "general warrants" -- which allowed officials of the Crown to enter any premises at any time to search for violations of the law or stolen property. (The

5. See generally "The History and Development of the Fourth Amendment to the United States Constitution," Johns Hopkins University Studies in Historical and Political Science, Series 55, No. 2, 1937.

6. Sir Matthew Hale, *History of the Pleas of the Crown*, (Philadelphia 1847) Vol. I, p. 580; Vol. II, p. 112.

searches under general warrants were similar to OSHA inspections, except OSHA substitutes "credentials" for the warrant).

The general warrant was held by Chief Justice Hale to be void.

"And, therefore . . . these general warrants . . . are not justifiable, for it makes the [officer] to be in effect the judge; therefore, searches made by pretense of such general warrants give no more power to the officer than what they may do by law without them."<sup>7</sup>

Hale went on to say that only specific warrants, limited in time and place and issued on probable cause were valid.

In the case of *Huckle v. Money*, 95 Eng. Rep. 768 (1763), Chief Justice Pratt stated that

"To enter a man's house by virtue of a nameless warrant is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."

In America the validity of searches and search warrants first arose in a dispute over the Writs of Assistance -- which empowered officers of the Crown to search at will, and authorized the apprehension of undescribed persons and the indiscriminate seizure of property.

The inherent rights of the individual versus the power of the government to issue warrants collided in a case argued

7. Hale, Vol. II, p. 150.

by James Otis in 1761 and recorded by John Adams.<sup>8</sup> Otis eloquently argued against the Writs of Assistance:

"I was described by one of the Court to look into the books and consider the question now before the Court concerning Writs of Assistance. It appears to me (may it please your Honours) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the Constitution, that ever was found in an English law-book. And as it is in opposition to a kind of power, the exercise of which in former periods of English history cost one King of England his head and another his throne, I have taken more pains in this cause, than I ever will take again.

". . . Writs of one kind may be legal, that is, special writs directed to special officers, and to search certain houses, especially set forth in the writ, may be granted . . . upon oath made . . . by the person . . . that he suspects such goods to be concealed in those very places he desires to search.

"*Special warrants only are legal.* The writ prayed for in this petition being general is illegal. It is a power that places the liberty of every man in the hands of every petty officer.

"No acts of Parliament can establish such writs; though it should be made in the very words of

8. 44. Petition of Lechmere, *Legal Papers of John Adams*, Vol. II, pp. 106-144.

the petition it would be void. An act against the Constitution is void."<sup>9</sup>

On July 3, 1776 John Adams wrote his wife from the Second Continental Congress that the resolution of independence had been passed and recollected "the argument concerning writs of assistance, which I have hitherto considered as the commencement of the controversy between Great Britain and America. . ." <sup>10</sup>(emphasis added)

In 1886 the United States Supreme Court recognized that the debate over warrantless searches "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Boyd vs. United States*, 116 U.S. 616, 625.

As reflected by Adams, the Founders of this Country considered the people's right to be secure in their persons and property, and to be free from unreasonable searches to be basic. They believed *all* power is vested in the people -- and were willing to relinquish this right *only* to the extent any search was conducted pursuant to a warrant issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>11</sup>

The First American precedent of a constitutional character for the Fourth Amendment was the Virginia Bill of

9. Ibid.

10. *Works of John Adams*, Vol. X, p. 276. See also Mabel Hill, *Liberty Documents* (New York, 1901) pp. 188-189. It was Adams' view that the issue of (what amounted to warrantless) searches under the Writs of Assistance was the spark that touched off the fight for independence. "Then and there the child Independence was born."

11. Fourth Amendment, United States Constitution.

Rights of 1776 -- which was later the pattern for the first ten amendments (Bill of Rights) to the Constitution.<sup>12</sup>

Although every other state followed Virginia's lead in adopting a Bill of Rights, many of the delegates to the Constitutional Convention opposed the inclusion of a Bill of Rights in the new constitution because they felt that "by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure."<sup>13</sup>

Others, however, such as Thomas Jefferson, James Madison and Patrick Henry wanted to specifically enumerate certain rights -- *since in their experience these were rights government eventually most encroached upon!*<sup>14</sup>

In the end, the latter view prevailed and a Bill of Rights in the form of ten amendments was attached to the Constitution. The prohibition against warrantless searches and seizures was included as the Fourth Amendment.

And today, in the words of James Otis, "No acts of [Congress] can establish such a [warrantless inspection]. An act against the Constitution is void."

12. See *Works of John Adams*, Vol. 3, p. 220; *The History and Development of the Fourth Amendment to the United States Constitution*, Johns Hopkins, p. 79; *The Papers of George Mason*, Vol. 1, pp. 274-291.

13. *Writings of James Madison*, Vol. V, p. 384; *Alexander Hamilton, The Federalist*, No. LXXXIV; *The Works of Alexander Hamilton*, Vol. 12, pp. 324-326.

14. *Writings of James Madison*, Vol. V, pp. 376-478.

This principle was reiterated by the Supreme Court in 1973 when it stated "it is clear of course that no act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272.

## II. DEVELOPMENT BY THE SUPREME COURT

During the century following the adoption of the Federal Constitution and its first Ten Amendments only a few cases involving interpretation of the Fourth Amendment reached the Supreme Court. The first case of significance was *Boyd v. United States*, 116 U.S. 616 (1886), which did much to chart the subsequent course of the Federal law.

*Boyd* was an action under customs revenue laws that provided civil and criminal penalties. The government prosecutor sought the production of defendant's documents to prove the value of 35 cases of plate glass. When the defendant argued the Fourth and Fifth Amendments prohibited what amounted to a seizure of his papers, the government responded that the Fourth Amendment was not applicable because this was a civil proceeding. After examining the history of the Fourth and Fifth Amendments, the Supreme Court stated that basically any search without a warrant was unreasonable. Then looking to the particular law in question, the Court concluded that although the "peculiar phraseology of this Act . . . expressly excludes criminal proceedings from its operation . . . [but rather] embraces civil suits for penalties and forfeitures . . ." the protections of the Fourth and Fifth Amendments were applicable.

"If the government prosecutor elects to waive an indictment and to file a civil information against

the claimants -- that is, civil in form -- can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens. This cannot be."<sup>15</sup>

The Court closed with an eloquent appeal for a liberal, and not merely a literal, construction of the Fourth Amendment.

"... it may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely; by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon."<sup>16</sup>

*Boyd* was followed by many cases further defining the Fourth Amendment limitation on searches. However, it was not until 1949 that the question of administrative inspections under health and safety laws was decided.

15. 116 U.S. at 634.

16. 116 U.S. at 635. This language was declared to be "worth repeating here" in *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971).

### III. FOURTH AMENDMENT APPLICABLE TO ADMINISTRATIVE INSPECTIONS

The first reported case dealing squarely with administrative inspections under health laws is *District of Columbia v. Little*, 178 F2d 13, 13 ALR 2d 954 (DC Cir. 1949) affd. 339 U.S. 1 (1950).

In *Little* the defendant was convicted for obstructing an inspector of the Health Department because she refused to unlock the front door and allow an inspection without a warrant. Like OSHA in the instant case, the District of Columbia argued that the health officer was empowered by valid statutes (passed by Congress) to enforce the public health laws requiring owners and occupants of premises to keep them clean; that the law authorized warrantless inspections for that purpose; that the attempted inspection was at a reasonable time by a uniformed officer who stated his purpose; and that the right of inspection to prevent and correct dangers, deficiencies, and nuisances is a valid and reasonable exercise of the police power. The Court's opinion discloses an extraordinary understanding of constitutional law and is quoted at length:

"The simple question is: Can a health officer of the District of Columbia inspect a private home without a warrant if the owner or occupant objects?"

"The Fourth Amendment to the Constitution applies.

"When the Constitution prohibits unreasonable searches, it, of course, by implication, permits

reasonable searches. But reasonableness without a warrant is adjudged solely by the extremity of the circumstances of the moment and not by any general characteristic of the officer or his mission. Moreover, except for the most urgent of necessities, the question of reasonableness is for a magistrate and not for the enforcement officer.

"It is said to us that the regulations sought to be enforced by this search only incidentally involved criminal charges, that their purpose is to protect the public health. It is argued that the Fourth Amendment provision regarding searches is premised upon and limited by the Fifth Amendment provision regarding self-incrimination. There is no doctrine that search for garbage is reasonable while search for arms, stolen goods or gambling equipment is not. The argument is wholly without merit, preposterous, in fact.

"We need not go beyond the record in this case for an example of the extremity to which the doctrine of the appellant District would take us. One of the two complaints made by the unidentified informant was that some of the occupants of the house failed to avail themselves of the toilet facilities. Reducing appellant's doctrine to practicalities, the result would be that if the owner of a house be reliably charged with concealing a cache of arms and munitions for purposes of revolution, police officers could not search without either permission or warrant, but if the information be that an occupant fails to avail himself of the toilet facilities, government

officials could enter and examine the house over protest and without a warrant.<sup>17</sup>

"The Fourth Amendment did not confer a right upon the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon.

"Much of the argument of the District is devoted to establishing the public importance of the health laws. Assertions are also made of the beneficence and forbearance of health officers. We may assume both propositions. But the constitutional guarantee is not restricted to unimportant statutes and regulations or to malevolent and arrogant agents. Even for the most important laws and even for the wisest and most benign officials, a search warrant must be had.

". . . When such regulations or laws purport to give officers authority to enter private homes against the occupant's protest, and without a warrant, when no compelling emergency involving public health is involved, a serious question of constitutional validity is raised. Health laws

17. Applying this to the instant case, if Barlow's Inc. was charged with concealing arms and munitions for purposes of revolution, police officers could not search without either permission or warrant, but if OSHA believes that Barlow's does not use open-end toilet seats, government officials may enter and inspect over protest and without a warrant.

can be enforced in the same manner as are other laws.

" . . . Absent such emergency, health laws are enforced by the police power and are subject to the same constitutional limitations as are other police powers. It is wholly fallacious to say that any particular police power is immune from constitutional restrictions."

*District of Columbia v. Little* was specifically mentioned and approved in *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). And the companion cases of *Camara* and *See v. City of Seattle*, 387 U.S. 541 (1967), are today definitive of the law dealing with warrant requirements for administrative searches and are controlling in the present case.

In *Camara v. Municipal Court* the Supreme Court heard the case "to reexamine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights . . ." 387 U.S. at 525.

In *Camara* appellant was charged with violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence. Section 503 of the San Francisco Housing Code provided:

"Authorized employees of the City department or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of their proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the City to perform any duty imposed upon them by the Municipal Code."<sup>18</sup>

18. Note the similarity to §8(a) of OSHA.

Nevertheless, when a city inspector sought to inspect his residence, appellant refused the inspector access to his apartment without a search warrant. Appellant argued that § 503 was contrary to the Fourth and Fourteenth Amendments in that it authorized municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code existed therein.

The District Court of Appeal held that § 503 did not violate Fourth Amendment rights because it "is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions."

The United States Supreme Court reversed, saying

" . . . one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by valid search warrant." 387 U.S. at 528-529 (emphasis added).

In *Camara*, appellee took the position that since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action," which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments were not involved.

The Supreme Court answered Appellee's argument by

stating

"...we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.'

"It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

"...Inspections of the kind we are here considering do in fact jeopardize 'self protection' interests of the property owner. Like most regulatory laws, fire, health and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense." 387 U.S. at 530-531.<sup>19</sup>

The Court also rejected the arguments (also made by OSHA in the instant case) that "the warrant process could not function effectively in this field" and "that the public interest demands warrantless administrative searches."

19. Although the criminal sanctions under the federal Act have been applied only rarely, it is a different story entirely in those twenty four states where OSHA is administered by state officials. Many states now regularly impose criminal sanctions against employers who decline to waive their Fourth Amendment rights and insist on a constitutional warrant as a prerequisite to an OSHA inspection. Cases such as *The People of The State of California v. Melvin Salwasser* CCH OSHD ¶ 21,797 (Fresno Municipal Court, 1977) and *State of North Carolina v. Cornelius Butler*, No. 77-CR2983 (Randolph County District Court, 1977) are typical.

"In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections." 387 U.S. at 534.

In the companion case of *See v. City of Seattle*, 387 U.S. 541 (1967), the Court held that *Camara* applied to similar inspections of commercial structures not used as private residences. The issue in *See* was whether a fire code inspector could enter and inspect appellant's locked commercial warehouse without a warrant and without probable cause to believe that a violation existed therein. The Court found the principles enunciated in the *Camara* opinion applicable.

"...we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. *The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too,*

*has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."* 387 U.S. at 543 (emphasis added).

The Court observed that

"As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation. Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a perusal of financial books and records." 387 U.S. at 543, 544.

Noting that it had not previously had occasion to consider the Fourth Amendment's relation to this broad range of investigations, the Court likened the Fourth Amendment issues to those raised by the administrative subpoena of corporate books and records, and stated

"We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.

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"It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. *But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.* Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 202 is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises." 387 U.S. at 544-545 (emphasis added)

Therefore, the Court concluded, "*administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.*" 387 U.S. at 545 (emphasis added).

As in *Camara*, the Court brushed aside the arguments of administrative expediency and the demand of the public interest for warrantless administrative searches. Excepting only "such accepted regulatory techniques as licensing pro-

grams which require inspections" the Court held

"...that the basic component of a reasonable search under the Fourth Amendment -- that it not be enforced without a suitable warrant procedure -- is applicable in this context, [administrative inspections] as in others, to business as well as to residential premises." 387 U.S. at 546

Since *Camara* and *See*, this Court has considered only one other case concerning administrative inspections conducted for purposes of promoting health and sanitation. And in *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), it reaffirmed *Camara* and *See* in express terms.<sup>20</sup>

The only exception to the warrant requirement for an administration search was recognized in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972). These two cases fall within the previously stated exception in *Camara v. Municipal Court* and *See v. Seattle* by holding that certain state or federally licensed activities may be inspected without a warrant.

In *Colonnade* the Court dealt with the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Noting that in *See* it had "reserved decision on the problems of licensing programs requiring inspection", 397 U.S. at 77, the Court held the *See*

20. The only non-OSHA case involving health and safety in the lower courts is *Klutz v. Beam*, 374 F.Supp. 1129 (W.D. N.C., 1973) (three-judge court) which disallowed a warrantless search of a private boat for violations of safety requirements.

test inapplicable because of the long history of government licensing and regulation of liquor.

In *United States v. Biswell*, respondent was a federally licensed firearms dealer. Again the Court<sup>21</sup> held *See* inapplicable, stating that "when a dealer chooses to engage in this pervasively regulated business and to accept a federal license he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." 406 U.S. at 316 (emphasis added).

Thus, in these two cases (*Colonnade* and *Biswell*) the Court merely reiterated that an exception to the warrant requirement of *See v. Seattle* and *Camara v. Municipal Court* is found where regulatory statutes authorize warrantless inspections of governmentally licensed and regulated enterprises.

In 1973 in *Almeida-Sanchez v. United States*, 413 U.S. 266, and again in 1977 in *G.M. Leasing Corp. v. United States*, 97 S.Ct., 619, U.S. the Court expressly confirmed that the only exception to the rule in *See* and *Camara* is in the case of governmentally licensed and regulated enterprises.

In *Almeida* the issue was whether the Border Patrol could search petitioner's car without a warrant. The government argued that the search was in effect an administrative inspection authorized by a valid federal statute, hence a warrantless search was authorized by *Colonnade Catering Corp. v. United States* and *United States v. Biswell*.

21. Justice White wrote the opinions in *Camara v. Municipal Court*, *See v. Seattle*, and *United States v. Biswell*. It was obviously not difficult to reconcile the latter case, since in *See*, 387 U.S. at 546, the Court had expressly excepted regulatory inspections under licensing programs.

The Supreme Court pointed out that *Colonnade* and *Biswell* were not applicable.

"Two other administrative inspection cases relied upon by the Government are equally inapposite. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.ed. 2d 60, and *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87, both approved warrantless inspections of commercial enterprises engaged in business closely regulated and licensed by the Government.

\* \* \* \*

"A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in *Biswell*.

'It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.' "

413 U.S. at 270, 271

Likewise, in January of this year the Court said in *G.M. Leasing Corp. v. United States*:

"The respondents argue that warrantless searches are justified by congressional enactment, as were the searches in *Biswell* and *Colonnade*, 97 S. Ct. at 630

\* \* \* \*

"The respondents [further] argue that the interest in the collection of taxes is such as to bring this case within the reasoning of *Biswell* and *Colonnade*. Those cases involved voluntary participation in a highly regulated activity. (emphasis added) 97 S.Ct. at 631.

\* \* \* \*

"In the present case, however, the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities, 97 S. Ct. at 629.

\* \* \* \*

"The intrusion into petitioner's office is therefore governed by the normal Fourth Amendment rule that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. at 528-29. 97 S.Ct. at 631.

Barlows -- and the millions of employers similarly situated -- are not engaged in a governmentally licensed and regulated industry. The Secretary of Labor is therefore required by the Fourth Amendment and the decisions of this

Court to obtain a search warrant.

The constitutional requirement of a warrant for administrative inspections has been restated and reaffirmed many times. It was followed in *District of Columbia v. Little*. It was reiterated by this Court in *Camara v. Municipal Court*. See *v. City of Seattle* held the same Fourth Amendment protections applicable to business and commercial establishments. This principle was only recently reaffirmed in *Air Pollution Variance Board v. West Alfalfa Corp.* Accordingly, inspections under the Occupational Safety and Health Act may be compelled only by means of a search warrant, based on probable cause.

#### IV. FOURTH AMENDMENT SPECIFICALLY APPLICABLE TO OSHA INSPECTIONS

The overwhelming consensus of federal and state courts is that the Fourth Amendment requires a warrant to compel objected to OSHA inspections.<sup>22</sup>

Relevant OSHA authority begins with *Brennan v. Gibson's Products, Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976). In *Gibson* a three-judge court was convened to "determine the meaning and constitutionality of . . . the inspection provisions of the Occupational Safety and Health Act."

22. The commentators also uniformly agree that warrants are required for OSHA inspections. See eg. Comment, "The Validity of Warrantless Searches Under The Occupational Safety and Health Act of 1970," 44 Cincinnati L. Rev. 105 (1975); Comment, "*Brennan v. Buckeye Industries, Inc.*: The Constitutionality of an OSHA Warrantless Search," 1975 Duke Law Journal 406; Comment, "Constitutional Law -- Fourth Amendment Prohibits Warrantless OSHA Searches -- *Brennan v. Gibson's Products, Inc.*," XI Suffolk University L. Rev. 156 (1976); Comment, "OSHA v. The Fourth Amendment: Should Search Warrants Be Required For 'Spot Check' Inspections?" 29 Baylor L. Rev. 283 (1977).

Speaking for a unanimous panel, Circuit Judge Gee wrote

"that facially the inspection provisions of OSHA amount to just such an attempt at a broad partial repeal of the Fourth Amendment as is beyond the powers of Congress. 407 F. Supp. at 157

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"We deal, as is the rule in such cases, with a clash of near-absolutes. On the one hand we have the Fourth Amendment, a safeguard to ordered liberty indispensable and, historically at least, pre-eminent. On the other stands the congressional enactment, clearly subject to the interpretation that diminishing the injuries, and consequent loss and suffering, caused by hazardous working conditions justifies investing OSHA compliance officers with something very like a perpetual general warrant." 407 F.Supp. at 158

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"OSHA's sweep is broad, and Congress' findings supporting it are slender. Made subject to its warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all "environments" where these employees work. It thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barber shops -- indeed, the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." 407 F.Supp. at 161

The court noted that *Gibson* -- unlike *Colonnade* and

*Biswell* - was not licensed, had no history of close regulation, and there was no "reason whatever, let alone a certainty, to believe the thing sought to be controlled - hazardous working conditions - exists in the area to be searched."

"Instead, we contemplate a roving commission in the vein of those considered in *Camara*, *See* and *Almeida-Sanchez*, exercised by these compliance officers in their unfettered discretion. No emergency existed, and no functional or general equivalent of probable cause such as *Camara* envisions is shown. This warrantless search would not comply with fourth amendment standards and cannot be countenanced." 407 F.Supp. at 162.

The Court concluded that

"Mindful of our duty to construe a statute, if possible, in a manner consistent with the fourth amendment, we believe that 29 U.S.C. § 657(a) was intended by Congress to authorize objected-to OSHA inspections only when made by a search warrant issued by a United States Magistrate or other judicial officer of the third branch under probable cause standards appropriate to administrative searches - that is, in a constitutional manner." 407 F.Supp. at 162

The Northern District of Ohio also rejected warrantless OSHA inspections in *Usery v. Rupp Forge*, F.Supp. ,

(1976), CCH OSHD ¶ 20,914, stating

"Upon review of the Act and the relevant case authority, the Court is constrained to conclude that Congress did not intend to enact, nor did it in fact enact, proceedings encouraging or authorizing broad, arbitrary administrative searches such as that herein suggested by petitioner. Clearly such unbridled authority is not cognizable under the Fourth Amendment to the United States Constitution."

Another three-judge court considered the same question in *Dunlop v. Hertzler Enterprises Inc.*, 418 F.Supp. 627 (D.N.M., 1976); and concluded

"Hertzler's subjection to the OSHA inspection scheme is based solely on its status as an employer. See n. 1 supra. As a manufacturer of ammunition and paper boxes, it is not engaged in a pervasively regulated business and thus cannot be deemed to have impliedly consented to regulatory inspection. See n. 11 supra. This circumstance renders the *Colonade-Biswell* rationale inapplicable here and requires that Hertzler's justifiable expectations of privacy be protected under the fourth amendment. Thus, the *Camara-See* rule is properly involved in this case, and the Administration must obtain a search warrant based on an appropriate showing of probable cause before Hertzler can be required to submit to the OSHA inspection previously resisted." 418 F.Supp. at 632.

In *Usery v. The Centrif-Air Machine Co., Inc., et al.*, 424 F. Supp. 959 (ND Ga. 1977) the Court agreed that "constitutional application of the inspection provisions contained in 29 USC § 657(a)" requires OSHA to obtain a warrant before being allowed to inspect.

On July 11, 1977 the Southern District of California found, in *Marshall v. Great Lakes Dredge and Dock Company*, F. Supp. (No. MISC 785-Civil) that § 657(a) "envision[s] a kind of walk-in authority to make inspections at any and all times on behalf of the OSHA regulations" and ruled that this apparent authority "is directly contrary to the requirements of the Fourth Amendment, prohibiting unreasonable searches and seizures."<sup>23</sup> See also *Marshall v. Shellcast Corp.*, F. Supp. (N.D. Ala. July 26, 1977) 46 U.S. L. Wk. 2080.

Numerous state courts - including the Alaska Supreme Court - have agreed that warrantless OSHA inspections are constitutionally prohibited.<sup>24</sup> And the courts of several

23. A transcript of the Court's remarks may be found at Appendix B since the case is not yet reported.

24. Any state which so desires may submit a state plan to assume responsibility for the administration of OSHA. 29 USC § 667.

If the Secretary of Labor approves the plan submitted by the State, the State becomes responsible for development and enforcement of safety and health standards. 29 USC § 667(c) requires that the state plan be "at least as effective" as the federal OSHA. Under § 667(c)(3) such plan must provide "for a right of entry and inspection . . . which is at least as effective" as 29 USC § 657.

Once a state plan is put into effect, the Secretary of Labor "shall make a continuing evaluation of the manner in which each state having a plan approved under this section is carrying out such plan" and may withdraw his approval and terminate the state plan § 667(f).

The cases referred to here have resulted from attempted warrantless inspections under these "approved state plans."

states have followed *Barlow's Inc.* and held their particular state Occupational Safety and Health Act unconstitutional because it failed to specifically provide for such a warrant. See *James R. Yocom, Commissioner of Labor, Commonwealth of Kentucky v. Burnette Tractor Co. Inc.*, (Court of Appeals of Kentucky, 1977) CCH OSHD ¶ 21,851; *State of Oregon ex rel Accident Prevention Division of the Workman's Compensation Board v. Keith R. Foster dba Keith Mfg. Co.* (Oregon Cir. Ct. 1976) CCH OSHD ¶ 21,255 (holding, inter alia, that an employer should be afforded the same rights as a common criminal); *State, ex rel New Mexico Environmental Improvement Agency v. Albuquerque Publishing Company* (NM Dist Ct. 1977) CCH OSHD ¶ 21,513; *State of Alaska Department of Labor v. General Home Repair and Roofing and Glen Smart* (Superior Ct. 1977) 6 BNA OCCUPATIONAL SAFETY & HEALTH REP. 948 *Woods & Rohde Inc. dba Alaska Truss & Millwork, et al. v. State of Alaska, Department of Labor*, P2d (Alaska Supreme Court, June 2, 1977) CCH OSHD ¶ 21,880; *Epstein v. Fitzwater Furniture* (Md. Cir. Ct. 1976), BNA 6 OCCUPATIONAL SAFETY AND HEALTH REP. 948; *State of California v. Melvin Salvasser* (Fresno Mun Ct. 1977) CCH OSHD ¶ 21,797.

The state cases can perhaps best be summed up in the words of Judge Croft, in *R. Lamar Baird v. State of Utah; State Industrial Commission, Division of Safety and Health, Utah Occupational Safety and Health Review Commission* (Utah Dist Ct. 1977) CCH OSHD ¶ 21,523:

"One cannot fault the declared public policy of this state as being to assure every man and woman in Utah a safe and healthful place in which to

work and to thereby preserve human resources (Sec. 35-9-2) but this cannot be achieved in a manner which results in the sacrifice of fundamental constitutional rights which the act, if carried out, would, in my opinion, substantially violate if not destroy.

"The act authorizes the industrial commission of Utah through the administrator of the occupational safety and health division of that commission, or his duly authorized representative, to write its own standards, rules and regulations; to enter, 'upon presenting appropriate credentials', without delay at reasonable times any workplace where work is performed by an employee of an employer; to inspect and investigate any workplace and all 'pertinent methods, operations, processes, conditions, structures, machines, apparatus, devices, equipment and materials therein'; and to question privately any employer, owner, operator, agent or employee (Sec. 35-9-8). A 'workplace' is any place of employment (Sec. 35-9-3(9)) and an 'employer' is any governmental entity, or company or any person having one or more workmen or operatives regularly employed in the same business under any contract for hire (Sec. 35-9-3(5)). The breadth of these definitions and the possibilities of unannounced, uninvited and compelled intrusions into the lives of all concerned staggers the imagination.

"No search warrant issued by a court upon probable cause is required under the provisions of this act to enter any 'workplace'. Any evidence of violation of any standard obtained during this inspection and in-

vestigation may obviously be used against an employer." ¶21,523 at p. 25,830.

Judge Croft's view is well stated. OSHA inspections are, for all practical purposes, unlimited in scope. The effect, when applied to nearly five million workplaces in this country, does truly "stagger the imagination."

The Secretary of Labor's argument to the contrary that warrantless OSHA inspections are "reasonable" is almost incredible.

## V. THE SECRETARY'S CASE

The Secretary's statements concerning the operation of OSHA are inaccurate and misleading-- obviously in an attempt to "make OSHA fit" within the narrow *Colonnade-Biswell* exception to the warrant requirement. Since, as Amicus, we will have no opportunity to refute these clearly erroneous statements at oral argument, we deal briefly with them here.<sup>25</sup>

### 1. THE "REASONABLE SCOPE" OF OSHA INSPECTIONS

The Secretary's entire case is predicated on the "reason-

25. The Secretary raises a number of extraneous points which we will not deal with because they are not relevant to the constitutional question involved here. For example, the Secretary repeatedly refers to statistics as to the number of work-related deaths and disabilities. These figures are very misleading -- if not largely inaccurate. However, even if correct, these statistics cannot justify abolishing the prior fourth amendment rights of every businessman in the country. There is an inalienable right to be free from warrantless searches. There is

ableness" of OSHA inspections. The Secretary urges that this case is not controlled by *Camara* or *See*, but rather by the holding in *United States v. Biswell*, because OSHA is "a regulatory inspection system of business premises that is carefully limited in time, place and scope." (Brief pp.32,41 42)

Nothing could be further from the truth.

It is difficult to conceive of a broader right of inspection or more expansive grant of authority than that granted by §8(a) of the Occupational Safety and Health Act. The Compliance officer may enter any factory, plant, establishment, construction site, or other area, workplace or environment to inspect any such place and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and may question privately any employer, owner, operator, agent or employee. 29 U.S.C. 657(a). Employers are to find solace in the fact that this must all be done during "regular working hours or other reasonable time" -- of course.

An OSHA inspection may not be compared to those in *Colonnade* or *Biswell*. In theory and in actual practice, an OSHA inspection is unlimited.

(Footnote 25 continued)

not an inalienable right to employment in a workplace with split-end toilet seats. As Judge Prettyman said in *District of Columbia v. Little*, the right to be free from warrantless searches "is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or suspicion of crime. It belonged to all men. \* \* \* Health officers may chafe at the inconvenience, but so do police officers." 178 F2d at 16-18. Besides, the Secretary's argument misses the point entirely. As this Court said in *Camara v. Municipal Court* "the question is not . . . whether these inspections may be made, but whether they may be made without a warrant." 387 US at 533.

When this unlimited scope of inspection is applied to the five million workplaces in this country, it is easy to see why Judge Croft, in *Baird v. State of Utah*, stated, "The breadth of these definitions and the possibilities of unannounced, uninvited and compelled intrusions into the lives of all concerned staggers the imagination." OSHD ¶ 21,523 at p. 25,830. And why Judge Gee in the *Gibson* case decided that OSHA compliance officers have been invested "with something very like a perpetual general warrant." 407 F. Supp. at 158.

Warrantless OSHA inspections do not comply with Fourth Amendment standards and should not be tolerated.

## 2. STATUTORY SAFEGUARDS

The Secretary argues that since the statutory and procedural safeguards "limit" the scope of the inspection and the inspector's corresponding discretion to search (Brief, p. 37); and since the selection of inspection sites is made by area supervisors, not by the officers in the field (Brief, pp 44, 45) -- there is nothing left for a magistrate to do! The magistrate's review is therefore not required!

When this same point was raised in *Camara*, however, the Court answered

" . . . broad statutory safeguards are no substitute for individualized review." 387 U.S. at 533.

The unlimited scope of OSHA inspections has already been pointed out. The Secretary's statement that selection

of inspection sites is made by area supervisors is not quite correct either. Sworn testimony in hundreds of cases before the Occupational Safety and Health Review Commission reveals that while the area supervisors do provide a list or printout of businesses from which the inspector chooses, selection of the actual workplace to be inspected is in most cases made by the officer in the field. (In fact, most the OSHA cases discussed in this brief resulted from random inspections.)

Accordingly, there are questions of scope and discretion which should be reviewed by a magistrate.

In addition, it must be remembered that OSHA has been preempted in many instances by other regulatory agencies.<sup>26</sup> The possibility therefore exists that OSHA may not even apply to a given employer. In actual practice, OSHA has often attempted to enforce inspections against employers who were regulated by other agencies.<sup>27</sup> *Marshall v. Great Lakes Dredge and Dock Company*, supra, is a case directly in point, where OSHA attempted to inspect a vessel which was subject to preemptive Coast Guard jurisdiction and inspection.

26. Section 4(b)(1) of the Act, (29 U.S.C. § 653(b)(1)) provides: "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

27. See e.g. *Newport News Shipbuilding and Drydock Co.*, OSHD ¶19,160 (1974) (Atomic Energy Commission); *Northwest Orient Airlines, Inc.*, OSHD ¶21,225 (1976) (Federal Aviation Administration); *Chevron Oil Co., et al.*, OSHD ¶21,606 (1977) (Office of Pipeline Safety of the Department of Transportation); *Dunlop v. Avondale*

Judicial review is imperative in such cases to determine which administrative agency -- often with conflicting regulations -- has jurisdiction over the employer in question; and whether OSHA has any right to inspect at all. Without such preliminary judicial determination an employer may face heavy monetary penalties or expensive administrative remedies from an agency which has no jurisdiction over him before he can obtain subsequent judicial review in the appellate courts.

Moreover -- and perhaps most importantly -- the magistrate's review is essential to prevent harassment of individual employers.

The Secretary has himself admitted that the limited number of compliance officers will enable OSHA to inspect each place of employment only once every 66 years.<sup>28</sup> Yet some employers have already been inspected numerous times.<sup>29</sup>

(Footnote 27 continued)  
*Shipyards Inc.*, F.Supp. (ED La. 1976) OSHD ¶20,415 (Coast Guard); *Gearhart-Owen Industries Inc. v. Secretary of Labor*, F2d (DC Cir. 1975); OSHD ¶20,164; (Department of Defense); *Brennan v. Southern Railway Co.*, F.Supp. (MD Ga. 1975) OSHD ¶19,742 (Federal Railroad Administration).

28. See the August, 1976 issue of *Factory Magazine* at page 16. A study by Cornell University labor economist Robert Stewart Smith estimates OSHA has enough manpower to check a typical workers plant once every 10 years and a general business establishment once every 77 years. Smith, "The Occupational Safety and Health Act," 62 (1976).

29. Cases of harassment by OSHA are not uncommon. The Weyerhaeuser Company, for example, has been cited under the same corrugator noise standard seven times. In each case Weyerhaeuser duly contested the citations and was found not guilty. The enforcement

Thus, as one commentator has aptly stated:

"[R]eview by a disinterested party will stop any unnecessary or harrassing intrusions. This is a function that even a 'rubber stamp' magistrate may be able to serve. Although OSHA inspectors are not limited in the number of times they may enter any particular building, even a busy judge would be able to recognize when the request for additional entries crossed the bounds of reasonableness. Thus, no matter how narrowly drawn the statute is that authorizes the administrative entry, the warrant machinery never will become redundant and unnecessary. Discretion to enter should not be stripped from the unbiased magistrate and placed within the power of the field official." 44 Cincinnati L. Rev. 105, *supra*, at 112 (1975)

### 3. WARRANT REQUIREMENT WOULD FRUSTRATE INSPECTIONS

The Secretary also contends that imposition of a warrant requirement would impede the effectiveness of OSHA and frustrate the intent of Congress (Brief, pp 37, 38). Surprise,

(Footnote 29 continued)

pattern against Weyerhaeuser was: inspection followed by corrugator noise citation, employer appeal, dismissal, and reinspection which started the whole process all over again. Finally, after spending 1642 man-hours of valuable working time and \$43,200 in actual litigation defense expenditures, Weyerhaeuser had had enough. So when OSHA attempted, after a similar inspection only five months earlier, to reinspect Weyerhaeuser's Warren, Michigan plant "to conduct the same study they did before" - Weyerhaeuser sought and obtained a preliminary injunction in federal court. *Weyerhaeuser Company v. Maurice S. Reizen et al.*, No. 7-71052 (ED Mich. June 7, 1977).

unannounced inspections - it is said - are essential to the enforcement of the statute.

This argument is belied by the Act itself, the legislative history of the Act, the Secretary's own procedures, and actual experience.

The Secretary urges that if an employer could gain delay by refusing an inspection without a warrant, his refusal would provide him with the functional equivalent of advance notice, allowing him to correct any hazardous working conditions during the interval between refusal and issuance of the warrant. (Brief, p. 39)

This argument is completely refuted by the fact that *the Act itself provides no sanctions for refusals to permit inspections* (which is strong evidence of Congress' intent in the matter<sup>30</sup>) - and by the Secretary's own regulations and procedures!

"Quite obviously, the Secretary of Labor is cognizant of the limitations placed upon his authority to conduct administrative searches. The intent of Congress to deny the arbitrary authority herein asserted is demonstrated by the provisions of 29 C.F.R. § 1903.4, and the Secretary's recognition of these limitations is manifested by the [inspection warrant] provisions of the OSHA Com-

30. 18 U.S.C. § 2236 also appears indicative of Congress' attitude in general on warrantless searches. That section imposes fines and imprisonment against government officers, agents or employees for searching private dwellings or "any other building or property" without a search warrant.

pliance Operations Manual itself." *Usery v. Rupp Forge*, OSHD ¶ 20,914 at p. 25, 113<sup>31</sup>

In sum, the Act itself, and the Secretary's own regulations prevent "instant inspections."

Moreover, in actual practice the Secretary has been functioning effectively under the warrant requirement. Numerous cases exist where the Secretary, upon being refused entry, has secured an administrative inspection warrant, pursuant to the procedure outlined in his Compliance Operations Manual.<sup>32</sup> And if surprise is critical and the Secretary has reason to believe an employer will refuse entry, the Manual provides:

31. A copy of the pertinent portions of Chapter 5 of the Manual is included as Appendix C so that this Court may read for itself the Secretary's original interpretation of § 8(a) of the Occupational Safety and Health Act.

Also attached is a copy of a letter to Congressman Robert Eckhardt from the Secretary of Labor emphasizing that it is OSHA's procedure to secure a search warrant where the employer does not consent to an inspection. This letter was forwarded to undersigned counsel in response to a previous letter to Congressman Eckhardt. In that letter the Secretary says flatly that "in the relatively few cases where the employer refuses to permit the OSHA inspector to enter, \* \* \* an appropriate warrant is obtained before proceeding further."

32. See e.g. *Gilbert & Bennett Manufacturing Co.*, F.Supp. (ND Ill, April 12, 1977) OSHD ¶ 21,798; *Marshall v. Beam Truck and Body Inc.*, CA No. 77-0031M, F.Supp. (D. RI, May, 1977)

See also remarks of Edward A. Bobrick, Regional Counsel for OSHA, U.S. Department of Labor, Chicago, Illinois to the American Bar Association, Section of Labor Relations Law, Institute on Occupational Safety and Health Law, April 29, 1976, to the effect that as a normal policy his office proceeds with an inspection warrant because it gains entry with a minimum amount of time.

"In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted."

Thus the element of surprise is preserved while affording the employer his constitutional rights.

The Secretary's argument that the warrant requirement cannot function here is simply not credible, in view of his own regulations, actual practice, and past experience, and the Act itself.

"Administration officials may therefore maintain their rigorous inspection program without drastic modification. Indeed, if an employer does refuse entry, the element of surprise, deemed essential by Congress, is hardly undermined by the warrant requirement. Whereas formerly the Administration instituted legal proceedings to enjoin the employer's resistance, now it would instead demonstrate to a magistrate the requisite probable cause to obtain a warrant. Neither procedure increases delay or diminishes surprise more than the other, nor do safety conditions permit the ease of concealment or correction that surprise prevents in the case of guns and liquor. XI Suffolk University L.Rev., supra, at 168.

Clearly, the warrant requirement should not be discarded

merely for the convenience of the Secretary.<sup>33</sup> "Although some added burden will be imposed upon the [Secretary], this inconvenience is justified in a free society to protect constitutional values." *United States v. United States District Court For The Eastern District of Michigan*, 407 U.S. 297, 321 (1972)

#### 4. EMPLOYERS HAVE NO SIGNIFICANT PRIVACY INTERESTS

The breadth of the Act, the unlimited scope of OSHA inspections, actual experience, and review of the applicable constitutional and case authorities substantiate that OSHA inspections are significant intrusions into employers' justifiable expectations of privacy. *Dunlop v. Hertzler Enterprises Inc.*, 418 F.Supp. at 632.

However, the Secretary contends that by opening the otherwise non-public portion of his premises to employees, knowing they may observe and report any violation of the Act, the employer relinquishes any justifiable expectation of privacy in such premises. In effect he grants to the employees "common authority" over the premises, and their interest in a safe and healthful environment amounts to "consent" to search which is valid as against the employer (Brief, pp. 30, 31). And the employer may not assert his ownership interest in the premises to bar the way of the inspector (Brief, p. 29).

33. The lower court's note that "Expediency is the argument of tyrants, it precedes the loss of every human liberty" seems particularly appropriate. The end does not justify the means in a constitutional system. 424 F.Supp. at n. 4.

The Secretary's argument has been repeatedly rejected by this Court in similar contexts. In *Chapman v. United States*, 365 U.S. 610 (1961), the Court held that a landlord's authority to enter his tenant's premises to view waste did not justify a search and seizure by police based solely on the landlord's consent. In *Stoner v. California*, 376 U.S. 483 (1964), the Court held that a hotel clerk could not authorize a police search and seizure of a tenant's room:

"It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's or the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. . . .

"No less than a tenant of a house, or the occupant of a room in a boarding house . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures . . . That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel." 376 U.S. at 489, 490.

It must be remembered that it is the *employer's* constitutional right that is involved here. That constitutional right was recognized and defined in *See v. Seattle*.

"The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." 387 U.S. at 543.

This Court recognized in *See* that an employer has a "justifiable expectation of privacy" in the private, non-public portion of his business premises.

The Secretary's argument that no such privacy interest exists wherever there is a "workplace where work is performed by an employee of an employer"<sup>34</sup> is patently untenable. The *Hertzler* case where OSHA tried to inspect Hertzler's home is a prime example. In fact, the Secretary makes no pretense that private residences are per se excluded from OSHA jurisdiction.<sup>35</sup> A homeowner who hires a carpenter to remodel his house is subject to OSHA inspections. "Mom and Pop" businesses where the proprietors live on the premises are also subject to OSHA. To say that an employer has no legitimate expectations of privacy in such circumstances is absurd.

In *See* and *GM Leasing* this Court said that business premises may be reasonably inspected in more situations than private homes. But what the Secretary apparently does not understand is that the Court held that *even in those additional situations* where business premises may be reasonably inspected "the basic component of a reasonable search under the Fourth Amendment -- that it not be enforced without a suitable warrant procedure -- is applicable." 387 U.S. at 546.

As this Court confirmed in *See*, even though employees are authorized and expected to be upon the private premises

34. *Baird v. State of Utah*, *supra*, at p. 25, 830.

35. See e.g. comments of Mike Levine of the Labor Department's Solicitor's Office, as reported in the Congressional Record, June 23, 1977, p. E4026.

of a business, that does not reduce the expectation of privacy that the businessman is justified in holding, that the public at large or law enforcement officers will not enter or view the premises.

## 5. WARRANTLESS INSPECTIONS UNDER OTHER REGULATORY STATUTES

As a final justification for extending the holding in *United States v. Biswell* to authorize warrantless OSHA inspections, the Secretary cites several cases decided under other federal regulatory statutes -- and three OSHA cases. None support the Secretary's position.

*U.S. ex rel Terraciano v. Montanye*, 493 F.2d 682 (2d Cir. 1974), upheld as constitutional a warrantless inspection and seizure of the narcotics records of a licensed pharmacist. *Terraciano* quoted and followed *Biswell* in recognizing an exception to the warrant requirement for regulatory inspections of licensed activities.

In urging the right to conduct a warrantless inspection, the State argued in *Terraciano* that *in accepting his license* the pharmacist had impliedly consented to state inspection. When compared to this Court's language in *Biswell* that "when a dealer chooses to . . . accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection," 406 U.S. at 316, *Terraciano* obviously provides no authority for any extension of *Biswell*.

The Secretary also cites and relies on *United States v. Del Campo Baking Mfg. Co.*, 345 F.Supp. 1371 (D. Del.

1972) and *United States v. Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973), which involved the validity of warrantless inspections under the Federal Food, Drug, and Cosmetic Act.<sup>36</sup>

Interestingly, the Third, Fifth, Eighth and Ninth Circuits have all held that either consent or a warrant is required to conduct FDA inspections. See *United States v. Thriftmart Inc.*, 429 F2d 1006 (9th Cir. 1970), cert. den., 400 U.S. 926; *United States v. Hammond Milling Co.*, 413 F2d 608 (5th Cir. 1969), cert. den., 396 U.S. 1002; *United States v. Kramer Grocery Co.*, 418 F2d 987 (8th Cir. 1969); *United States v. Stanack Sales Co.*, 387 F2d 849 (3rd Cir. 1968); *United States v. Alfred M. Lewis, Inc.*, 431 F2d 303 (9th Cir. 1970), cert. den., 400 U.S. 878.

The District Court in *Del Campo Baking*, however, construed the Supreme Court decision in *United States v. Biswell* to allow warrantless FDA inspections in pervasively regulated food and drug businesses.

"The fact that Congress has not required the Del Campo business to obtain federal licenses to operate is wholly immaterial. Defendants' business of manufacturing, processing, packing and distributing food products for introduction into interstate commerce is as 'pervasively regulated' by the Federal Food, Drug and Cosmetic Act, and the regulations promulgated thereunder, as if it were federally licensed. No rational or valid distinction can be drawn for compliance inspections between a federally licensed business and one so

36. 21 U.S.C. §374(a)

completely regulated by the Act under the commerce power." 345 F.Supp. at 1376, 1377

The District Court in *Business Builders* merely follows the reasoning in *Del Campo Baking*.<sup>37</sup>

Significantly, both of these cases were decided before *Almeida-Sanchez*, *Western Alfalfa* and *GM Leasing* reaffirmed *Camara* and *See*. However, even if the circuit court decisions on FDA inspections are wrong, and even if *Del Campo Baking* and *Business Builders* are correct in extending *Biswell* to employers engaged in pervasively regulated, if not licensed, industries -- they have no application to OSHA inspections because *not all of the five million places of employment in this country are "as pervasively regulated as if [they] were federally licensed."* 345 F.Supp. at 1377.<sup>38</sup>

In *Youghiogeny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio, 1973) (three-judge court), the court refused to find the inspection procedures of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., which the court assumed to authorize warrantless

37. Although the Secretary also appears to rely on *United States v. Litvin*, 353 F.Supp. 1333 (D. D.C., 1973), that case is totally inapposite because there the Court concluded "that Litvin did openly and voluntarily consent to the inspection."

38. Also, FDA inspectors *know with a certainty* that the concerns searched manufacture and label food, cosmetic and/or prescription drugs. Compare *Almeida-Sanchez* on this point at 413 U.S. 271. By contrast, *Barlows Inc.* is not licensed, it has no history of close regulation, and OSHA is not limited to such businesses. "Nor is there any reason whatever, let alone a certainty, to believe that the thing sought to be controlled -- hazardous working conditions--exists in the area to be searched." *Gibson*, *supra*, at p. 162.

searches, to be unconstitutional. Its holding was based upon implied consent inferred from participation in the "pervasively regulated" coal industry:

"Plaintiff does not, of course, argue that the coal industry is not a "regulated" one within the meaning of *Almeida-Sanchez*. Nor do we understand the plaintiff to contest the historicity of such regulation under the standard of *Colonnade*, where the Court noted that the liquor industry has '... long [been] subject to close [governmental] supervision and inspection.' *Id.*, 397 U.S. at 77, 90 S.Ct. at 777. Also see *LaRue v. California*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1973). We believe the same is equally true of the coal industry which, as noted above, has long been held subject to the Congress' powers under the Commerce Clause. It would appear then that plaintiff at bar, a business in a pervasively regulated industry, *has consented* by implication at least, to reasonable intrusions by federal authorities." (Emphasis added) 364 F.Supp. at 49, 50.

The court specifically pointed out in its footnote 7:

"Our view might be entirely otherwise were we not dealing with a business context of a nearly inherently dangerous type. If Congress, for example, after taking note of the wide incidence of crime, authorized warrantless entry into private homes, we would be unable to reconcile such a statute with the command of the Fourth Amendment. 364 F. Supp. at 52

Although involving safety, *Youghioghenny* is clearly distinguishable from the situation under OSHA. It cannot be said that the five million businesses covered by OSHA have been historically and pervasively regulated, and that their business is of an "inherently dangerous type." Further, the court in *Youghioghenny* noted that there was no right to search offices on mining property. Under OSHA, however, the compliance officer is "entitled" to conduct an unlimited search in any location to which employees normally have access, including offices.

The case of *United States v. Western & A.R.R.*, 297 F. 482 (ND Ga. 1924) falls within the long recognized "open fields" doctrine mentioned in *Western Alfalfa*, and is totally inapplicable here. The Georgia court indicated that the inspectors did not enter "any office or private place" but "only that they went upon the open tracks, where the cars were used, and looked at them." The court rightfully concluded that "a search is not made merely by looking at that which is open to view."

The lower court case most directly supporting the Secretary is *Brennan v. Buckeye Industries, Inc.*, 374 F.Supp. 1350 (S.D. Ga. 1974), which upheld a warrantless search under OSHA. After discussing, in light of *Colonnade*, *Biswell*, *Terraciano*, and *Youghioghenny*, the company's contention that *Camara* and *See* required the Secretary to obtain a warrant, the court stated:

"Buckeye Industries is, constitutionally speaking, marching to the beat of an antique drum."

In making that statement and in holding as it did, the court

was clearly in error, as is obvious from *Almeida-Sanchez*, *Western Alfalfa*, and *GM Leasing*, all of which cases expressly reaffirm that *Camara* and *See* are not "antique drums."<sup>39</sup>

The other OSHA case cited by the Secretary is *Dunlop v. Able Contractors*, (D. Mont., Civ. No. 75-57-BLG, Dec. 15, 1975) wherein the Court relied entirely on *Buckeye* in allowing a warrantless inspection. There is no mention of *Almeida-Sanchez* or *Western Alfalfa*. Had the Court been aware of these cases it most surely would not have granted OSHA's petition, since Judge Battin stated:

"This decision is regrettable; I find the Occupational Safety and Health Administration and its position in this case to be very distasteful."<sup>40</sup>

The Secretary also mentions in passing *Lake Butler Apparel Company v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975). However, the court there did not reach the Fourth Amendment issue because the OSHA search in that case was purely consensual.

39. Commentators have been unanimously critical of the decision in *Buckeye Industries*. See "*Brennan v. Buckeye Industries Inc.: The Constitutionality of an OSHA warrantless search*" 1975 Duke L.J. 406, which concluded that it was the court, not the corporation that was out of step. See also note 22, *supra*.

40. It should be noted that the three-judge court in *Dunlop v. Hertzler* specifically considered the *Able Contractors* case and found it, like *Buckeye*, to be not controlling.

Judge Battin is apparently now aware of *Almeida-Sanchez*, *Western Alfalfa* and *GM Leasing*. On September 1, 1977, he dismissed OSHA's Petition for an Order compelling an inspection in *Empire Steel Manufacturing Co. v. Marshall*, F.Supp. No. CV-77-48-BLG, (D. Mont.)

In short, none of the lower court cases relied on by the Secretary support his contention that general warrantless regulatory searches are a long accepted practice. They substantiate instead that *Camara* and *See* are in fact the general rule, to which *Biswell* is the narrow exception.

The "border stop" cases have no application in the present case. Border stops have never been governed by the warrant and probable cause provisions of the Fourth Amendment. The rationale for this exception is set forth in *Carroll v. United States*, 267 U.S. 132, 154 (1925):

"Travellers may be so stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in"

See also *Boyd v. United States*, 116 U.S. 616, 623 (1886):

"As this act [the first statute authorizing customs inspections at the border, Act of July 31, 1789, ch. 5, 1 Stat. 43] was passed by the same Congress which proposed for adoption the original Amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the Amendment."

Even in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) which upheld warrantless "stops" at fixed checkpoints, this Court carefully distinguished "stops" from "searches" and the situation there involved from that in *Camara*.

## VI. THE PROBABLE CAUSE REQUIREMENT

If the Court holds warrantless OSHA inspections unconstitutional -- as indeed we feel the Fourth Amendment constrains it to do -- the Court would then appear to have three alternatives:

(1) The Court can declare the inspection provisions of the Act unconstitutional and thereby require Congress to formulate a "suitable warrant procedure" <sup>41</sup> including "reasonable legislative or administrative standards" (per *Camara*) to assist the Courts in determining probable cause for the issuance of such warrants. This is the course which the lower court believed proper.

(2) The Court can hold only that warrants are constitutionally necessary to compel objected-to OSHA inspections.

(3) The Court can hold that the Fourth Amendment warrant requirement applies to OSHA inspections -- and definitively set forth those criteria upon which lower courts can rely in determining "administrative probable cause" to issue OSHA inspection warrants.

In the event the Court pursues the latter course, we here

41. As it has done under other laws. See e.g. Controlled Dangerous Substances Act, 21 U.S.C. §880.

provide an analysis of the case law and opinions of the commentators <sup>42</sup> concerning the appropriate factors to be considered in determining the existence of "administrative probable cause" for the issuance of OSHA inspection warrants.

Such an analysis must of course begin with *Camara v. Municipal Court*, where this Court first indicated a somewhat relaxed standard of probable cause is appropriate for administrative inspection warrants. After distinguishing administrative and criminal searches the Court said:

"... This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." 387 U.S. at 538

42. Although there are relatively few cases on the subject of administrative probable cause, numerous commentators have discussed this very difficult question. See e.g. Lefave, "Administrative Searches And The Fourth Amendment: The *Camara* and *See* Cases," 1967 Supreme Court Review 1; Comment, "Administrative Inspection Procedures Under The Fourth Amendment -- Administrative Probable Cause" 32 Albany L.Rev. 155 (1967); Sonnenreich and Pinco, "The Inspector Knocks: Administrative Inspection Warrants Under An Expanded Fourth Amendment," 24 SWLJ 418 (1970); Note, "Administrative Search Warrants," 58 Minn L. Rev. 607 (1974); Greenberg, "The Balance of Interests Theory And The Fourth Amendment: A Selective Analysis of Supreme Court Action Since *Camara* And *See*," 61 Calif. L.Rev. 1011 (1973).

In the case of "area searches" to enforce uniform municipal building codes, for example, the Court said that probable cause "will not necessarily depend upon specific knowledge of the condition of a particular building." In such cases probable cause may be based upon "the passage of time, the nature of the building (e.g. a multi-family apartment house), or the condition of the entire area."<sup>43</sup> In other cases -- the Court went on -- where experience shows the need for periodic inspection, "the passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant."<sup>44</sup>

The Court pointed out that this new probable cause standard was not intended "to authorize a 'synthetic search warrant' and thereby to lessen the overall protections of the Fourth Amendment,"<sup>45</sup> but reminded that the warrant procedure in administrative searches is "designed to guarantee that a decision to search private property is justified by a reasonable governmental interest" -- just as it has always been, even in criminal cases.<sup>46</sup>

In securing warrants to conduct OSHA inspections the Secretary contends he need only show that a particular establishment is "apparently covered" by the Act (Brief, p. 51, n. 27). He argues that the "reasonable governmental interest" -- hence probable cause -- is established by the simple existence of the Act.

43. 387 U.S. at 538.

44. Ibid.

45. 387 U.S. at 538.

46. 387 U.S. at 534, 535.

The Secretary's argument, if accepted, would have the result of "authorizing synthetic search warrants and thereby lessening the overall protections of the Fourth Amendment" which this Court repudiated in *Camara*.

In *Camara* the Court specifically mentioned, by way of example, *certain specific relevant factors* which a judge or magistrate could consider in making a probable cause determination. These factors were *in addition to* the mere existence of the ordinance itself. Likewise, in *Almeida-Sanchez*, Justice Powell in his concurring opinion mentioned that "although standards for probable cause" in the context of administrative warrants "are relatively unstructured, there are a number of relevant factors which would merit consideration."<sup>47</sup> He then went on in that case to list several factors to be considered -- *in addition to the statute itself* -- in determining probable cause for issuing a warrant to conduct an area border search. See also *United States v. United States District Court*, 407 U.S. at 323.

In effect, this Court has taken the view that the evidentiary requirement of the Fourth Amendment is not a rigid standard, requiring precisely the same quantum of evidence to support a warrant in all cases. Instead, it is a flexible standard permitting a lesser quantum of evidence when the search is less intensive than that generally permitted in a criminal investigation. But at the same time there still must be *some* particular evidence concerning the place to be searched.<sup>48</sup>

47. 413 U.S. at 283.

48. See Lefave, *supra*, at pp. 17-20.

It seems clear, then, that Fourth Amendment protections – as previously expressed by this Court in *Camara*, *Almeida-Sanchez* and *U.S. District Court* – mandate a showing of something more than simply that an establishment is “apparently covered” in order to establish probable cause for issuance of an OSHA inspection warrant.

The lower courts have generally followed this rule in deciding whether appropriate probable cause existed to issue OSHA administrative inspection warrants.

In *Dunlop v. Hertzler Enterprises Inc.*, supra, the Secretary secured an inspection warrant without making any showing of probable cause. Thus, one of the issues in *Hertzler* was whether “29 U.S.C. § 657(a) permits OSHA compliance officers to conduct a nonconsensual inspection of a business covered by the Act without first making any showing of probable cause.” 418 F. Supp. at 629 (emphasis added)

The Court reviewed all the applicable authority on administrative searches, and concluded that OSHA could

“conduct nonconsensual inspections only pursuant to the authority of a warrant issued upon satisfaction of standards of probable cause which have been articulated in the area of administrative searches... 418 F.Supp. at 634.

The Court noted that

“The warrant application included only a recitation of the OSHA inspection provisions as autho-

rity for the proposed inspection plus statements to the effect that inspection of Hertzler was necessary to determine its compliance with OSHA and that OSHA inspectors previously had been denied entry.” 418 F.Supp. 629, n. 3

Therefore, the Court threw out the warrant and held that

“Since no showing of probable cause was made for the issuance for the warrant to inspect Hertzler an injunction will be issued permanently restraining the plaintiff from making a non-consensual entry, inspection and investigation of the Hertzler premises . . .” 418 F.Supp. at 634

The *Hertzler* court expressly rejected the Secretary’s position that he need only show an employer is “apparently covered” by the Act to secure a warrant.

In *Brennan v. Gibson’s Products*, supra, the Secretary stipulated that the provisions of the Act do not constitute probable cause per se.<sup>49</sup> And the court in *Usery v. Centrif-Air*, supra, also found the Act in and of itself does not serve as probable cause sufficient to support an OSHA administrative inspection warrant.<sup>50</sup> In *Re: The Matter of Work Site Inspection of Alfred Calcagni & Sons, Inc.*, No. CC 77-0046M (D. RI, May, 1977) held likewise.

*Marshall v. Shellcast*, supra, involved an inspection of a foundry. The Secretary based his warrant request on “the basis that in 1973 the incident rate in the iron and steel

49. 407 F.Supp. at 155 n. 2, 156

50. 424 F.Supp. at 961 n. 3

foundry industry was approximately three times that of employers generally." The Court held the probable cause requirement for nonconsensual OSHA inspections of a particular employer's premises cannot be satisfied by reference to industry-wide violation statistics when detailed information regarding the premises sought to be investigated is otherwise available.

"It is unnecessary and inappropriate to use an incident rate mechanism for a national industry as justification for a search when, as here, the particular incident rate of a particular plant can be obtained if it is not already obtained. In short, the court, while certainly recognizing what *Camara* has said, is also saying that where individualized information is present, OSHA or other similarly situated organizations cannot close their eyes to the individual situation, relying upon some national accumulated group of statistics."<sup>51</sup> 46 U.S.L.W. 2080.

Several state courts have also held there must be at least some particularized information as to the individual establishment to be inspected, in order for probable cause to exist. In *State of Oregon v. Keith R. Foster*, supra, OSHA secured two inspection warrants. The only "cause" shown was that this was a "routine safety inspection" authorized by the statute. The Circuit Court found

51. Another foundry case, *Marshall v. Chromalloy American Corporation, Federal Malleable Division*, F. Supp. (ED Wisc. July 12, 1977) OSHD ¶ 22,008, held that because foundries are subject to a "national emphasis program" probable cause existed to support a warrant in that case. We believe the sparse reasoning in *Chromalloy* is thoroughly refuted by the subsequent *Shellcast* case in the Northern District of Alabama. Besides, if a "national emphasis program" constitutes per se probable cause, then the Labor Department bureau-

"The only grounds recited in the Warrant for its issuance were that the inspection was 'a routine inspection of a place of employment pursuant to ORS 654.067' and that 'The records of the Accident Prevention Division indicate that the firm has not been inspected pursuant to the Oregon Safe Employment Act, ORS 654, since December 12, 1974.'"

"At no time in these proceedings, either in support of its applications for Inspection Warrants or during the hearing on the Order to Show Cause, has the Accident Prevention Division made, or attempted to make, any showing of probable cause to believe that a condition of non-conformity with a safety or health statute, ordinance, regulation, rule, standard or order exists or has existed on defendant's business premises, or that defendant has ever had an employee who suffered death, injury, or illness as a result of his employment in defendant's business."

The Court therefore concluded that the Oregon statute violated both the Fourth Amendment and Oregon Constitution. *State of California v. Melvin Salwasser* and *Baird v. State of Utah*, supra, employed the same reasoning and

(Footnote 51 continued)

cracy can effectively side-step the Fourth Amendment by the simple expedient of instituting a new national emphasis program whenever necessary.

*North Carolina v. Butler*, mentioned supra at note 19, is an example of the fallacy of statistics. There the State predicated its warrant request on the fact that trailer manufacturing businesses (such as *Butler's*) had an unusually high injury rate. However, *Butler* had had only one minor finger injury in the previous twelve years!

reached the same result.<sup>52</sup>

Further, in requiring at least some individualized showing of probable cause for administrative inspection warrants, the courts in OSHA and other inspection cases have identified a "number of relevant factors."<sup>53</sup> These factors -- which a judge or magistrate may consider in determining whether appropriate probable cause exists to issue an OSHA (or other) administrative inspection warrant -- include:<sup>54</sup>

1. Is the employer actually subject to the Act, or has OSHA been pre-empted by some other agency? e.g. *Marshall v. Great Lakes Dredge and Dock Co.*, and cases cited at note 27, *supra*

2. Is there an employee complaint of a hazardous working condition? e.g. *Marshall v. Beam Truck and Body, Inc.*; *Gilbert and Bennett Mfg. Co.*, *supra*.

3. Is there a past history of violations? e.g. *Gilbert and Bennett Mfg. Co.*, *supra*.

52. Many states, in assuming administration and enforcement of OSHA pursuant to their "approved state plan" have adopted statutes specifically providing for administrative inspection warrants. Often these statutes provide *criminal penalties* for failure to honor warrants issued only on the basis that a proposed inspection is "routine" (e.g. Ore. Rev. Stats. 654.067 and § 1822.52 Anno. Calif. Code) or that the inspection is part of a "legally authorized program of inspection which naturally includes that property" (e.g. N.C. Gen. Stat. § 15-27.2). Such statutes permit OSHA to get an *ex parte* writ (warrant) of assistance without any probable cause showing -- and to impose criminal sanctions for failure to honor such writs. See note 19, *supra*.

53. As did Justice Powell at 413 US 283.

54. The State of New York, for example, has been applying many of these factors and regularly issuing administrative warrants since the *Camara* decision in 1967. See Blabey, "See and Camara: Their Far-Reaching Effect on State Regulatory Activities and the Origin of the Civil Warrant in New York", 33 Albany L. Rev. 64 (1968).

4. Has the inspector observed any apparent violations (from viewing the premises or suspicious conduct)? e.g. *U.S. v. Blanchard*, 495 F2d 1329 (1st Cir. 1974); *Butler v. North Carolina*, No. C-77-191-G, (M.D.N.C.) June 16, 1977; *U.S. v. Consolidation Coal Company, et al* F2d (6th Cir. July 21, 1977), OSHD ¶ 22,007; *U.S. v. Greenberg* 334 F. Supp 364 (WD Pa. 1971).

5. Has the employer been inspected before; and if so, how recently? e.g. *Weyerhaeuser v. Reizen*, *supra*.

6. Has there been a recent work-related death at the employer's work place? e.g. *Gilbert and Bennett Mfg. Co.*, *supra*.

7. What do the employer's accident and injury records reveal?<sup>55</sup> e.g. *Marshall v. Shellcast*, *supra*.

These factors, together with those mentioned in *Camara*, and others which may conceivably be relevant to a particular employer or circumstance, have and will enable a judge or magistrate to intelligently determine whether probable cause exists to issue an OSHA inspection warrant.

55. All employers with ten or more employees are required by 29 USC § 657(c) and the Secretary's regulations to keep records of employee job-related injuries and illnesses. Falsifying such records subjects an employer to criminal penalties under 29 USC § 666(a). *U.S. v. Consolidation Coal Company*, *supra*, suggests the employer has no privacy interest in these records because they are maintained pursuant to the Act. ¶ 22,007 at p. 26, 511. *Shellcast* indicates the Secretary should request these records as part of their probable cause determination. Presumably, if the employer furnishes them willingly and they reflect a good safety record, in the absence of any other factors, probable cause to inspect will not exist.

## VII. CONCLUSION

A Case Comment on the *Gibson's Products* decision in the December, 1976 issue of *Suffolk University Law Review* concluded:

"Only the most tortured construction of fact, history, and case law could constitutionally justify a warrantless OSHA inspection. Given the breadth of the statute and its potential for serious abuse, the preservation of individual rights demands strict adherence to the requirements of the fourth amendment."

This view has been overwhelmingly subscribed to by the courts. The decisions cited throughout this brief demonstrate convincingly that protections of liberty that have been deemed fundamental in this country since before the Revolution are not "the beat of an antique drum," but remain both vital and viable shields against every new experiment on our liberties.

Respectfully submitted

---

Robert E. Rader, Jr.  
1266 E. Ledbetter  
Dallas, Texas 75216  
214/371-2395

## CERTIFICATE OF SERVICE

I hereby certify that        copies of the foregoing Brief  
were mailed this        day of September, 1977 to:

APPENDIX A

§ 657. Inspections, investigations, and recordkeeping

Authority of Secretary to enter, inspect, and investigate places of employment; time and manner

(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE EDWARD J. SCHWARTZ,  
JUDGE PRESIDING

RAY MARSHALL, Secretary of Labor,  
United States Department of Labor,  
Petitioner

No. Misc. 785 -Civil  
COURT'S RULING

vs.

GREAT LAKES DREDGE AND DOCK  
COMPANY,  
Respondent

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
San Diego, California  
July 11, 1977

REPORTED BY: DONNA L. McQUEENEY  
Official Court Reporter  
CSR No. 2990

APPEARANCES

For the Petitioner: JOHN M. ORBAN, ESQ.  
Associate Regional Solicitor  
By: THERESA KALINSKI, ESQ.  
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For the Respondent: CHICKERING & GREGORY  
By: ROBERT W. TOLLEN, ESQ.  
111 Sutter Street  
San Francisco, California 94104

SAN DIEGO, CALIFORNIA, MONDAY, JULY 11, 1977,  
10:45 A.M.

\*\*\*\*\*

(Other matters).

THE COURT: Well, I recognize at the outset that there is some infirmity in the procedure that is being followed here by the Secretary of Labor with respect to the filing of what amounts to an application for an order, which is generally not a recognizable proceeding in the Federal courts. On the other hand, I think that possibly this is the kind of vehicle that the Secretary of Labor feels is the proper way to proceed, and to present the matter before the Court and to obtain some kind of ruling. I would at least pass over that for the moment because I think the appli-

cation for an order may be in effect regarded as being in the nature of a complaint, although it certainly doesn't meet the ordinary requirements of a complaint.

I think, however, there are more important concerns here than the question of the correctness of the procedure or the formalities involved. First of all, with respect to the matter of preemption, I think there is a pretty fair argument that can be made that the regulations of the Coast Guard do preempt. This is a vessel, or whatever, that is subject to Coast Guard jurisdiction and inspection. I don't think there is much question about that. And Section 4(b)(1) of OSHA does provide in part that "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." And although there is no direct Ninth Circuit authority on this, other courts have held that this particular exemption from OSHA applies when another agency has actually exercised a statutory authority to regulate employees' safety.

The real problem that I see with the application, however, has to do with the problem that arises out of the Fourth Amendment. And there have been a number of cases where similar applications have run into trouble because of the belief of the courts that to grant the power or authority that seems to be visualized in Section 8(a) of OSHA would be to allow something to be done that is directly contrary to the requirements of the Fourth Amendment, prohibiting unreasonable searches and seizures.

Now, it is true that there are some cases which seem to

support the position of the Petitioner here, and of course, I'm referring primarily to the Colonnade Catering Corporation case, which is 397 U.S. 72, where the Court upheld a warrantless inspection of premises of a retail liquor dealer, and *United States v. Biswell*, 406 U.S. 311, which upheld a warrantless inspection of a firearms dealer. The problem, of course, with those cases is that they did definitely involve industries which were and had been for a long time subject to close supervision and inspection by governmental agencies. And in each instance, the business involved was one that was pervasively regulated.

I don't think that is the kind of business that we have here being conducted by the Great Lakes Dredge and Dock Company. I don't think there is any pervasive state or federal regulation that requires the kind of inspection authority that's being contended for here by the Government.

And I would call attention to the case of *Usery v. Centrif-Air Machine Company*, 424 F. Supp. 959, in which the Court says on page 961, "In light of more recent precedent, we must reject the Buckeye court's interpretation. Rather we agree with several recent well-reasoned decisions which have construed Colonnade and Biswell as narrow exceptions to *Camara* and *See* which operate to negate the warrant requirement for unconsented administrative inspections only when: (1) the enterprise sought to be inspected is engaged in a pervasively regulated business; (2) the inspection will pose only a minimal threat to justifiable expectations of privacy; (3) warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent federal interest; and (4) the inspection may be carefully limited as

to time, place and scope."

And similarly in *Barlow's Incorporated v. Usery*, 424 F. Supp. 437, the Court on page 440 says, "We reject the notion as espoused in *Brennan v. Buckeye Industries*" -- omitting citations -- "that the *Colonnade* and *Biswell* decisions envision a trend of the Supreme Court to generally narrow the holdings of *Camara* and *See*. Instead, we find that the warrantless inspection scheme pursuant to OSHA is more properly aligned with and must be controlled by the holdings in *Camara* and *See*."

And then further on down the page, "We simply cannot overlook the fact that in *Colonnade* and *Biswell* the court dealt with an 'industry long subject to close supervision and inspection' and a 'pervasively regulated business.' We believe that both of those cases fit into the *Camara* categorization of 'certain carefully defined classes of cases.' We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce."

And I think that is the problem and the infirmity with the kind of inspection that is sought here on behalf of the OSHA regulations. It simply envisions, that is the section under which the order is sought, merely envisions a kind of walk-in authority to make inspections at any and all times on behalf of the OSHA regulations. And the courts have not been attracted by that concept. And I am not either.

Accordingly, the application for an order to permit the OSHA entry for inspection purposes is denied, and the matter is dismissed.

MR. TOLLEN: May I submit an order, your Honor?

THE COURT: Yes. Will you please submit it to opposing Counsel for approval as to form?

MR. TOLLEN: Yes, your Honor.

Your Honor, is the Court's ruling based on both the preemption and the Fourth Amendment?

THE COURT: Well, it certainly is based on the Fourth Amendment. I think we place it squarely on that. I am not absolutely sold on the preemption, although I think it's there.

MR. TOLLEN: And I take it the order should refer solely to the Fourth Amendment?

THE COURT: Probably.

Thank you, Counsel.

MS. KALINSKI: Thank you, your Honor.

MR. TOLLEN: Thank you.

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### CERTIFICATE

I, DONNA L. McQUEENEY, CSR, hereby do certify that I am a duly appointed, qualified and acting Official Court Reporter for the United States District Court, Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings held on July 11, 1977, in the matter of Ray Marshal, Secretary of Labor, United States Department of Labor vs. Great Lakes Dredge and Dock Company, Case No. Misc. 785 - Civil, consisting of pages numbered 1 through 7.

Dated this 29th day of July 1977.

s/ Donna L. McQueeney  
DONNA L. McQUEENEY  
Official Court Reporter  
CSR No. 2990

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### APPENDIX C

#### COMPLIANCE OPERATIONS MANUAL

JANUARY 1972

A manual of guidelines for implementing the  
Occupational Safety and Health Act of 1970

UNITED STATES DEPARTMENT OF LABOR - J. D.  
Hodgson, Secretary Occupational Safety and Health  
Administration - George C. Guenther, Assistant Secretary

## FOREWARD

On December 29, 1970, President Nixon signed the Williams-Steiger Occupational Safety and Health Act of 1970 (Public Law 91-596) thereby establishing a national commitment. Congress declared its purpose and policy was ". . .to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources--".

This Manual represents the effort of the Occupational Safety and Health Administration to develop effective guidelines necessary to implement the Act. Changes and additions will be made to the Manual on a continuing basis as determined necessary by experience gained.

Responsibility for the Occupational Safety and Health Administration field compliance operations program rests with each Regional Administrator. The instructions and procedures contained within this Manual shall be followed to the degree necessary to assure effective and uniform implementation of the Act.

s/ G. C. Guenther  
George C. Guenther  
Assistant Secretary of Labor  
Occupational Safety and Health  
Administration

- b. The Area Director's approval of the CSHO inspection schedule shall be obtained prior to entering an establishment at other than day-time working hours, except where obtaining approval would cause undue delay.

## 2. *Refusal to Permit Inspection-Warrants*

- a. Section 8 of the Act provides that CSHO's may enter without delay and at reasonable times any factory or establishment covered under the Act for the purpose of inspecting with reference to safety and health standards issued under the Act. The CSHO shall tactfully present his credentials to the owner, operator or agent in charge at the establishment and explain generally the nature and purpose of his visit. He should further explain generally the scope of the inspection and the records he wishes to review.
- b. In cases where a CSHO encounters a refusal to permit entry, he should advise his Area Director, who will in turn refer the matter to the appropriate Regional Administrator and the Regional Solicitor with a request that an inspection warrant be obtained.
- c. If an employer refuses to permit an inspection, the CSHO should advise the employer that the Act (Section 8(a) provides for an inspection, but he shall not state or imply that the law provides any penalty for refusing permission to inspect. If there is still a refusal to permit inspection, CSHO shall endeavor to ascertain the reason for such refusal. He will leave the premises and shall immediately report the re-

fusal and the reason therefore to the Area Director. The AD shall immediately consult with the Regional Administrator and the Regional Solicitor who shall promptly take appropriate action including compulsory process, if necessary.

- d. In doubtful cases where permission is not clearly given, or where the employer shows hesitation, or absents himself for a period of time, the CSHO should proceed as indicated. He should not engage in argument or discussion concerning refusal, with the exception that he shall inquire briefly as to the reason for refusal, or may answer reasonable question (e.g., the scope of the inspection and its purpose), but he should avoid any impression of insistence or intimidation concerning his right to inspect.
- e. In cases where entry has been allowed and the employer interferes with or limits an important aspect of the investigation, the CSHO should decide whether to complete the inspection to the extent possible, or to discontinue the inspection and through the Area Director alert the Regional Administrator, and request the Regional Solicitor to seek an *inspection warrant*. For example, if the employer refuses to permit the walkaround or to permit the CSHO to examine records which are essential to the inspection, the inspection should be discontinued and an *inspection warrant sought*. In other cases where the employer interferes with or limits the inspection, the inspection should be completed and the matter discussed with the Area Director as to further appropriate action.

- f. In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted. Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted.
- g. The Regional Solicitor's office should be alerted immediately by telephone by the Area Director when it becomes necessary to request that a warrant be obtained. Thereafter, within 48 hours after the determination is made by the Area Director that a warrant is necessary, the Area Director will transmit to the Regional Solicitor: (1) a written summary of all facts leading to the refusal of entry or limitation on inspection; (2) all previous investigations of the employer, including previous safety and health investigations under such acts as the Walsh-Healey Public Contracts Act and the Longshoremen's Harbor Workers' Compensation Act; (3) so much of the current inspection report as has been completed; (4) information as to the name and position of the individual or individuals barring entry or limiting inspection; and (5) the names and addresses of any witnesses to the refusal or limitation of the inspection.
- h. *A warrant is a legal process issued by a United States Magistrate or a United States District Court Judge which will be directed to the CSHO authorizing the*

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CSHO to conduct an inspection of premises which will be described in the warrant. Under the terms of the warrant, the CSHO will be authorized to conduct an inspection of the described premises at reasonable times during ordinary business hours, and to inspect in a reasonable manner and to a reasonable extent, including the collection of samples, if necessary, an examination of the establishment and all pertinent equipment, finished and unfinished materials, structures, machines, records and all other things therein bearing on occupational safety and health. All questions arising concerning reasonableness of any aspect of an inspection conducted pursuant to a warrant shall be

\*\*\*\*\*

(Emphasis added)

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U.S. DEPARTMENT OF LABOR  
Office of the Secretary  
Washington

Oct 16 1973  
Received Oct 16 1973  
Bob Eckhardt, M.C.

Honorable Robert C. Eckhardt  
House of Representatives  
Washington, D.C. 20515

Dear Congressman Eckhardt:

This is in response to your request for our consideration of a letter from Robert E. Radar, Jr., attorney at law, Dallas, Texas, concerning the alleged lack of legal due process afforded under the Williams-Steiger Occupational Safety and Health Act of 1970.

Mr. Radar states that "OSHA maintains its right to enter and inspect privately owned premises without a warrant of any kind" and in his view the inspection provisions of the Act violate the Fourth Amendment restriction on searches. As you know, Section 8(a)(1) of the Act authorizes the Secretary "to enter without delay and at reasonable times . . . any area . . . where work is performed by an employee of an employer" and inspect therein. This must be read in conjunction with Section 8(a)(2) which requires inspections and investigations to be conducted "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . .". The inspections authorized are not "unlimited". In most instances the employer consents to the inspection, making a warrant

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unnecessary. However, in the relatively few cases where the employer refuses to permit the OSHA inspector to enter, the matter is referred to the Department of Labor's Regional Solicitor and *an appropriate warrant is obtained before proceeding further*. The law, and the Department's implementation thereof, I believe, complies with the constitutional protection against unreasonable searches and seizures. (Emphasis added)

\* \* \* \*

Sincerely,

s/ Ben Brown  
Benjamin L. Brown  
Deputy Under Secretary for  
Legislative Affairs

Supreme Court, U. S.  
FILED

SEP 27 1977

State  
MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1977

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**No. 76-1143**

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RAY MARSHALL, Secretary of Labor, et al.,  
*Appellants,*

VS.

BARLOW'S, INC.,  
*Appellee.*

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On Appeal from the United States District Court  
for the District of Idaho

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**BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF APPELLEE**

---

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IN THE  
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On Appeal from the United States District Court  
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**BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF APPELLEE**

---

**OPINION BELOW**

The opinion of the three-judge district court is reported at 424 F. Supp. 437 (D. Id. 1976).

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**INTEREST OF AMICUS**

Pacific Legal Foundation (hereinafter PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support with the general community. The Board has authorized the filing of this brief *amicus curiae*.

All of PLF's members, contributors, and supporters, as well as all American citizens, will be vitally affected by the subject matter of this litigation.

At issue in this case is the right of American citizens to be secure from arbitrary governmental intrusion. The Fourth Amendment to the Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Although the language of the Fourth Amendment is clear, the government claims the right to conduct warrantless inspections of businesses pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 657(a) (1970). If the OSHA warrantless inspection provision is upheld, it will provide a dangerous precedent that threatens to swallow the Fourth Amendment in the interest of administrative expediency.

PLF, as a public interest organization, supports the goal of a safe workplace for all Americans. This goal can and must be achieved, however, without sacrificing the personal liberties guaranteed all citizens by the Fourth Amendment.

Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consents have been filed with the Clerk of this Court.

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#### SUMMARY OF ARGUMENT

Pursuant to Section 8(a) of OSHA, the government claims the right to "inspect" without a warrant all areas where work is performed by an employee in the United States. These "inspections" are, in reality, warrantless searches of private property. The Fourth Amendment right asserted by the appellee in this case is the historic right of all Americans to be free from governmental invasion of privacy and individual liberty.

This Court has upheld the right of the individual against warrantless government inspections based upon administrative expediency. Because the rights protected by the warrant requirement are so fundamental, this Court has held that warrantless administrative "inspections" or searches are violations of the Fourth Amendment unless they are made under certain extraordinary circumstances which are not present here. This case presents no emergency or inherently dangerous situation. However, requiring that a determination of probable cause be made by a mag-

istrate would reduce the risk that "discretionary" searches would be used for purposes of harassment. Moreover, there is no evidence that a warrant requirement would frustrate the government's objective of providing a safe workplace for all Americans. In fact, since OSHA annually inspects only 1.6 percent of the workplaces covered by the Act, a probable cause requirement would better protect employees by shifting the inspection emphasis to more serious safety violations. A warrant requirement would in no way diminish the elements of surprise and employer motivation deemed critical by OSHA.

If warrantless administrative searches are upheld upon the ground of administrative expediency, then the Fourth Amendment will be diluted to the point of becoming merely form and not substance. Inspections pursuant to state and federal statutes have become so pervasive that they threaten to swallow all Fourth Amendment protection. The OSHA inspection provision at issue is extremely broad in its sweep. Allowing this broad exception to the warrant requirement will set a precedent for further encroachments on the right to privacy.

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## ARGUMENT

### I

#### THE EXTREME VIEW ASSERTED BY THE GOVERNMENT IS REPUGNANT TO THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT

This case presents another attempt by the government to "vindicate an extreme view of the Fourth

Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other 'high privacy areas.'" *U.S. v. Chadwick*, — U.S.—, 45 U.S.L.W. 4797, 4801 (1977) (Blackmun, J., dissenting).

Pursuant to Section 8(a) of OSHA, 29 U.S.C. § 657(a), the government claims the right to inspect, without a warrant, all areas "where work is performed by an employee." In arguing for "reasonable warrantless inspections" and protection of "significant privacy interests" (Brief for the Appellants (hereinafter Brief) at 15), the government is urging a return to the earlier rationale that the Fourth Amendment is inapplicable when an administrative inspector touches only on the "periphery" of protected Fourth Amendment rights. (See, *Frank v. Maryland*, 359 U.S. 360 (1959).) These assertions by the government that the power to make a warrantless search in "civil" matters was greater than the governmental authority in criminal matters "perverts the Amendment." *Able v. United States*, 362 U.S. 217, 254 (1960) (Brennan, J., dissenting). Moreover, it ignores that the warrant requirement comes not only from the Fourth Amendment, but also from the long conflict between arbitrary governmental conduct and the rights of individuals to be secure from governmental intrusions into areas not traditionally regulated.

One of the earliest challenges to warrantless administrative searches occurred in 1949. In *District of Columbia v. Little*, 178 F.2d 13, *aff'd on other*

*grounds*, 339 U.S. 1 (1949), the United States Court of Appeals for the District of Columbia Circuit proscribed warrantless administrative searches of private homes. A District of Columbia ordinance required dwellings to be kept clean. Health officials were empowered to inspect any dwelling believed to be in an unsanitary condition. In this case Mr. Little refused admittance to the "inspector" and was arrested and convicted in municipal court. The government argued on appeal that the Fourth Amendment applied only to searches for criminal evidence and that the protections of the Fourth Amendment could not be invoked unless there was a possibility of self-incrimination. Judge Prettyman rejected this argument and found that the protection of the Fourth Amendment applied to "civil" as well as criminal searches. The Fourth Amendment was designed to protect the common law right to privacy. This prohibition against searches:

"was the common-law right of a man to privacy in his house, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. . . . To say that a man suspected of a crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity." *District of Columbia v. Little*, 178 F.2d at 16-17.

This "fantastic absurdity" applies equally as well to health inspectors as police:

"This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite." *Id.* at 17.

Although the rationale of *Little* was briefly eclipsed, the dissenters in *Frank*, applying a historical analysis, argued that the First, Fourth, and Fifth Amendments were the result of a bitter lesson of the American Revolution and that the purpose of the Fourth Amendment was to proscribe all unreasonable intrusions into the privacy of American citizens:

"These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Frank v. Maryland*, 359 U.S. at 376 (Douglas, J., dissenting).

In the dissenters' view the detached magistrate was clearly crucial to preserving individual liberty.

In 1967, this Court overruled *Frank* and reaffirmed a warrant requirement in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967). *Camara* involved an area safety inspection. During an inspection of an apartment

house the city inspector demanded to view the ground floor in belief that the area was being used as a residence contrary to the building's occupancy permit. The inspector's demand was denied. After two more refusals, the tenant was arrested.

In overruling *Frank*, this Court held that the Fourth Amendment's purpose is to safeguard individual privacy against arbitrary invasions by government officials. These decisions clearly require that except in cases of emergency or consent a warrant must be obtained. This Court proclaimed:

"The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.'" *Camara*, 387 U.S. at 528.

This prohibition against unreasonable searches and seizures has been consistently followed and exceptions allowed only in carefully defined cases. The *Frank* rationale that municipal fire, health, and housing inspections touch at most upon the "periphery" of the important interests protected by the Fourth Amendment was specifically rejected in *Camara*:

"But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amend-

ment only when the individual is suspected of criminal behavior." *Camara*, 387 U.S. at 530 (footnote omitted).

In language clearly applicable to the case at hand, this Court rejected the government's attempts to discount the warrant procedure:

"We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for *individualized* review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *Id.* at 533 (emphasis added).

Finally, this Court rejected the exact arguments of expediency which are once again being asserted by the government:

"[I]t is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards . . . . But we think this argument misses the mark. The question is not . . . whether these inspections may be made, but whether they may be made without a warrant." *Id.* at 533 (emphasis added).

The warrant requirement could be relaxed only if the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. In *Camara*, as in this case, the warrant requirement as a practical matter was found to have slight impact upon municipal health and safety. No emergency ex-

isted in *Camara* and no reason existed for the government's refusal to get a warrant.

The rationale in *Camara* clearly applied to business premises. In *See*, this Court held:

"We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." *See*, 387 U.S. at 545 (footnote omitted).

Barlow's business premises are clearly protected by the Fourth Amendment. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *G.M. Leasing Corp. v. United States*, — U.S. —, 45 U.S.L.W. 4098 (January 12, 1977).

Broad, random searches, such as those conducted by OSHA, of American business premises are precisely the type of abuse this Court sought to void in *Camara* and *See*. The government's attempt in this case to create a "safety" exception to the Fourth Amendment is not based upon any historical or constitutional evidence and for these reasons should be rejected.

Searches of business premises have been allowed only in extraordinary cases involving inherently dangerous and historically federally licensed businesses. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). OSHA has attempted to stretch this narrow exception to cover "any factory, plant, establishment, construction site, or other area, work-

place or environment where work is performed."<sup>19</sup> In a classic circular argument, OSHA contends that the limited exceptions of *Colonnade* and *United States v. Biswell*, 406 U.S. 311 (1972), which allow inspection of pervasively regulated industries, should apply to all of American industry since OSHA is attempting to pervasively regulate American industry! (Brief at 43-44.)

If this were to apply to the entire gamut of American business, the Fourth Amendment would be drastically weakened. In *G.M. Leasing Corp.* this Court held unconstitutional a search by the Internal Revenue Service agents of a private home and office. As in this case, the government asserted that a broad exception to the Fourth Amendment existed which allowed warrantless intrusions into privacy in order to enforce the tax laws.

In rejecting this argument this Court held the government to a heavy burden:

"We do not find in the cited materials anything approaching the clear evidence that would be required to create so great an exception to the Fourth Amendment's protections against warrantless intrusions into privacy." *G.M. Leasing Corp.*, 45 U.S.L.W. at 4103.

<sup>19</sup>29 U.S.C. § 657(a) (1970). It is difficult to conceive of a more encompassing definition of American industry. The amazing scope of this Act reminds one of the Writs of Assistance which authorized agents of the Crown to enter houses, shops, warehouses, cellars, ships and other structures. "The Rights of the Colonists and a List of Infringements or Violations of Rights, 1772." Schwartz, *The Bill of Rights: A Documentary History* at 205 (1971).

In focusing on the absence of strong statutory authority for searches in exigent circumstances, this Court noted that:

"The intrusion into petitioner's office is therefore governed by the normal Fourth Amendment rule that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'" *Id.* at 4104.

The government attempts to distinguish *Camara* and *See* by arguing that "a requirement of search warrants for the Secretary's routine general schedule OSHA inspections would provide no meaningful safeguard for an employer's privacy interests." (Brief at 34-35.) Further, the government notes that the scheduling of OSHA inspection is not a matter left to the discretion of the enforcement officer in the field but rather is scheduled by the Secretary's Assistant Regional Directors and Area Directors. (Brief at 37 n.17.)

The government's argument seems to be that unbridled discretion is permissible so long as it occurs at a sufficiently high administrative level. This raises the exact issue resolved by this Court in *G.M. Leasing Corp.* This Court there held:

"The respondents recognize that one of the Court's critical concerns in *Camara* and *See* was the discretion of the seizing officers. . . . Yet [the statute] clearly gives the Secretary or his delegate discretion as to what property to seize. If more than one location is involved, the Secretary

will choose which dwelling will be invaded. If property is to be found both in public places and in private areas, the Secretary may choose which to seize. This hardly can be called a restraint on discretion." 45 U.S.L.W. at 4104.

One of the lessons learned from recent history is that federal administrative and investigative agencies have the potential to be used for purposes of harassment, political or otherwise. No great imagination is required to envision a partisan administration using the inconveniences attending "discretionary" OSHA inspections to punish its enemies. This very real danger requires the interposition of a detached magistrate in order to determine whether probable cause for inspection exists.

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## II

### THE RATIONALES OF OSHA FOR A "WORK SAFETY" EXCEPTION TO THE FOURTH AMENDMENT ARE FACTUALLY AND LEGALLY INACCURATE

The government in its brief has attempted to reverse the burden of proof and turn the Fourth Amendment against the very people it was intended to serve. The government states: "Here, there is no significant privacy interest at stake that calls for the *imposition* of the warrant requirement." (Brief at 13 (emphasis added).) Two assertions serve as underpinning for the government's rejection of the Fourth Amendment. Both of these assertions are untrue.

**A. Unannounced Warrantless Searches Are Not Necessary to the Effective Implementation of OSHA**

While the government repeatedly asserts "that unannounced inspections are essential to the enforceability of the statute" (Brief at 16), this assertion is unsupported. In reality, the overwhelming weight of evidence indicates that warrantless searches are unnecessary to achieve a safe workplace.<sup>2</sup>

Additionally, OSHA admits that warrantless unannounced searches are not crucial to the implementation of the Act:

"... OSHA prefers to achieve voluntary compliance through its training, education and information programs. The programs are based on an enlightened relationship existing between OSHA and the vast majority of the business community. In other words, I am assuming that most employers will comply with OSHA's standards if they know what they need to do and are convinced that a safe and healthful workplace pays."<sup>3</sup>

Reliance on voluntary compliance is one of the many alternative forms of government safety and health programs available. Another method of achieving a

<sup>2</sup>"A major reason for the long-range decreases in fatality, injury, and severity rates relates to the changing mix of industries comprising the United States economy. Moreover, automation has reduced accidents and the severity of accidents within heavy industry. Bolle, Mary Jane, "Benefits and Costs of the Occupational Safety and Health Act: A Review of the Available Evidence," *Congressional Research Service* 13 (Jan. 28, 1977).

<sup>3</sup>Smith, Robert Stewart, "The Occupational Safety and Health Act," *American Enterprise Institute* 64 (January 1976), quoting a memorandum of John H. Stender, Assistant Secretary of Labor for OSHA to James L. Blum, dated October 31, 1973.

safer workplace is through informational programs. Government research on safety hazards and the distribution of warnings can effectively reduce hazards especially if this form of safety is accompanied with financial penalties which are another alternative method of injury reduction. These penalties could be built into a workman's compensation system or into an injury "tax" system.<sup>4</sup>

The important factor here is that a myriad of alternate approaches to a safe workplace exist, the vast majority of which are within the constitutional framework of the United States. These constitutional approaches have resulted in a forty-year trend of decreasing work accidents.<sup>5</sup> OSHA's unconstitutional efforts have had little or no effect in accelerating this trend.

**B. It Is Misleading to Allege that Violations Can Be Easily Concealed**

The government's brief raises the spectre of hidden violations capable of discovery only by unannounced OSHA inspections. The employer's fear of unan-

<sup>4</sup>*Supra*, note 3 at 73. The use of economic incentives as a possible solution to the OSHA dilemma (and parenthetically the Fourth Amendment problems) has been suggested by the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, and a Domestic Affairs Aid to the President. The memorandum states in part:

"Among other issues serious consideration should be given to totally eliminating most safety regulations and replacing them with some form of economic incentives." *Occupational Safety and Health Reporter*, "Current Report," July 1977, at 236.

<sup>5</sup>*National Safety Council*, "Accident Facts," 23 (1976). This publication graphically illustrates this historic decline in accidents.

nounced inspections will keep the workplace safe. The government even asserts that an employer "often can easily conceal hazardous working conditions." (Brief at 12.)

Beyond these vague references, however, there is little or no substance to OSHA's assertions. The number of willful violations discovered overall by OSHA is miniscule when compared with the total number of violations.<sup>6</sup>

The remedial nature of OSHA is well established.<sup>7</sup> Surprise, deceit, and generalized fear are elements of punitive enforcement programs and as such cannot justify warrantless searches under a remedial statute. Yet the government argues for the broadest of all tools to enforce this remedial legislation—a tool historically associated with repression. The public interest has always been hostile to unconstrained "dragnet" type searches. This Court observed in *Camara*:

"For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods,

<sup>6</sup>The number of willful and repeat violations amounted to only 1,003 out of a total of 139,714 violations for the period of October 1976 to June 1977. Willful violations are, of course, an even smaller part of this total. Of the willful violations, not all are "hidden" violations. OSH.<sup>4</sup> apparently keeps no statistics on "hidden" violations and none are cited in its brief. (See, OSHA Compliance Activity Report for July 30, 1977.)

<sup>7</sup>*Anning-Johnson Company v. United States O.S. & H.R. Com'n*, 516 F.2d 1081, 1088 (7th Cir. 1975).

even with a warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Camara*, 387 U.S. at 535.

Since OSHA inspections are entirely random and without cause, they fall into the proscribed category of general searches.

**C. Probable Cause Searches Would Provide Greater Protection for Workers Than Would Random Inspections**

The government lays great stress on the inconvenience of obtaining a warrant before attempting an inspection. In its Brief at 40, appellant notes that the Act covers nearly 65 million workers in approximately five million workplaces and the Secretary is currently conducting 80,000 inspections yearly with 1,300 inspectors.

If the Secretary is inspecting only 80,000 of the five million workplaces, this means that he can inspect annually only 1.6 percent of all workplaces. Such an extremely low rate of inspection demands some basis for selection in order to maximize the effectiveness of the inspection. To expend this severely limited capacity on random shots in the dark is the height of administrative incompetence. The purpose of the Act, to protect the American worker, would be far better served by requiring a probable cause triggering mechanism for such inspections. Such a device has in fact been established in the very section of the Act which creates the inspection power. When any employees or represen-

tatives of employees believe that a safety or health violation exists, they may notify the Secretary. The Secretary must then evaluate such notification to determine whether there are reasonable grounds to believe that such a danger exists. If the Secretary finds such grounds, he must make a special inspection. If not, he must notify the employees in writing. 29 U.S.C. § 657(f)(1).

Shifting the thrust of OSHA inspections to this type of probable cause evaluation would no doubt upgrade the effectiveness of the inspections. Although the government makes the undocumented statement that its data shows that random general schedule inspections result in a higher percentage of discovered violations than those triggered by complaints or fatality reports (Brief at 36 n.15), such quantification is meaningless. We are not given a readout of the relationship of truly dangerous violations as opposed to the nit-picking variety for which OSHA has become notorious. Mere logic, however, would indicate that it is more important to find a smaller number of major hazards, than to find an infinite number of wholly technical violations.

Although *amicus* is somewhat nonplussed by the "cops and robbers" mentality evidenced by OSHA in its brief, a requirement of probable cause for inspection would in no way diminish either the treasured element of surprise nor the motivation of employers to maintain a safe workplace. Obtaining a warrant would not require advance notice to employers. And the employers' safety orientation would

be increased by the knowledge that rather than running a 1.6 percent chance of a random inspection, substantial hazards brought to OSHA's attention by employee complaints would trigger an immediate inspection.

A probable cause requirement, then, would in no way diminish the effectiveness of OSHA but rather would immediately upgrade the quality of inspections and allow a greater number of inspections of truly hazardous workplaces.

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### III

#### ADMINISTRATIVE SEARCHES IF LEFT FREE OF CONSTITUTIONAL RESTRICTIONS WILL SWALLOW THE FOURTH AMENDMENT

Whether a warrant should be required before an administrative search may take place without consent is increasingly important in our society. Federal inspectors are competing with state and local inspectors, criminal investigators, tax inspectors, safety inspectors, health inspectors, and a myriad of environmental inspectors on all levels of government.<sup>6</sup> There is no end in sight.

In each case the privacy of one's life is diluted. In this case the government has suggested that there

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<sup>6</sup>Administrative searches are discussed in: Rothstein and Rothstein, "Administrative Searches and Seizures: What Happened to Camara and See?", 50 Wash. L. Rev. 341 (1975); Comment, "The Validity of Warrantless Searches Under the Occupational Safety and Health Act of 1970," 44 Cinn. L. Rev. 105 (1975); T. Cooper, "Administrative Inspections and the Fourth Amendment," 12 Washburn L.J. 203 (1973).

are no "legitimate privacy expectations" and that there is "no Fourth Amendment standing." These are frightening propositions which run counter to law and history.

The "right of privacy" is "one of the unique values of our civilization" (*McDonald v. United States*, 335 U.S. 451, 453 (1948)), and protection against governmental intrusions into the home and workplace is "the very essence of constitutional liberty and security." *Boyd v. United States*, 116 U.S. 616, 630 (1886).

The OSHA statute in issue here has no safeguards against abuse. No judicial officer is interposed between the searching officer and the individual. The statute is broad in its sweep; OSHA inspectors seek to search all business premises without probable cause. The massive sweep of OSHA must be considered as a broad challenge to the second clause of the Fourth Amendment.

For this Court to sanction this major step beyond *Camara* and *See* would "reduce the protection of the householder 'against unreasonable searches' to the vanishing point." *Ohio v. Price*, 364 U.S. 263, 269 (1960).

Every drawer, cabinet, room, refrigerator, chair, and cranny in the workplace is subject to inspection. The Fourth Amendment provides a zone of privacy against government; the warrant clause provides a buffer between the individual and government:

<sup>9</sup>Jurisdictional Statement of Government at 14-15 and n.17.

"[P]rotection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age—industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society."<sup>10</sup>

The strict requirements of a warrant must apply across the full gambit of federal intrusion. The history of the Fourth Amendment requires a broad construction with strict adherence to the necessity of obtaining a warrant prior to any search. This requirement of a warrant is based upon the value attached to the neutral and detached magistrate and the existence of reasonable grounds for a search. *Johnson v. United States*, 333 U.S. 10 (1948). Exceptions to this construction must be narrowly drawn. Here a broad exception will swallow the Fourth Amendment protections as to the entire business sector. No historical or factual justification exists for this precedent.

<sup>10</sup>Emerson, "Nine Justices in Search of a Doctrine," 64 Mich. L. Rev. 219, 229 (1965).

**CONCLUSION**

For the reasons stated above, the decision of the three-judge court should be affirmed.

Respectfully submitted,

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September, 1977.

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**SEP 27 1977**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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**No. 76-1143**

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RAY MARSHALL, SECRETARY OF LABOR, *et al.*, Appellant,  
v.  
BARLOW'S, INC., Appellee.

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On Appeal From The United States District Court  
For The District Of Idaho

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**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE ON BEHALF OF THE  
MOUNTAIN STATES LEGAL FOUNDATION**

**and**

**BRIEF OF THE  
MOUNTAIN STATES LEGAL FOUNDATION  
AS AMICUS CURIAE**

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AS AMICUS CURIAE**

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The Mountain States Legal Foundation respectfully moves for leave to file the annexed brief *amicus curiae*.<sup>\*</sup> In support of this motion, the Foundation states:

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<sup>\*</sup> Pursuant to Rule 42 of the Rules of this Court, the Mountain States Legal Foundation requested consents from all parties to the

1. The Mountain States Legal Foundation was organized in early 1977 as a Colorado non-profit, tax-exempt corporation to engage in nonpartisan legal research, study and analysis for the benefit of the general public and to engage in litigation as a friend of the court at all levels of the legal process to affect evolving concepts of the law. It is supported by voluntary contributions from a cross-section of the public. The Foundation takes an interest in questions of law of a national scope and especially those that have a direct impact in the Mountain States region, including the State of Idaho where the subject case arose.

2. The issue involved in this case—whether inspectors of the Occupational Safety and Health Administration of the United States Department of Labor can, consistent with the Fourth Amendment to the Constitution, engage in indiscriminate roving searches of commercial premises without warrants based upon a showing of probable cause to a neutral magistrate—is of vital concern to every citizen and to employers, large and small, throughout the nation. Throughout the two-hundred-year history of the nation, most employers, except those in tightly regulated industries, have been free from warrantless searches of their premises by Federal officers. The Occupational Safety and Health Act challenges this traditional protection. Owing allegiance to no interest other than that of the general public, the Mountain States Legal Foundation respectfully requests leave to present its views as a friend of the Court.

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filing of a brief *amicus curiae* in support of Appellee. Counsel for Appellee furnished such consent, while the Solicitor General of the United States has authorized the *amicus* to state that he has no objection to the filing of this brief. These letters of the parties have been filed with the Clerk of the Court.

For the foregoing reasons, the Mountain States Legal Foundation respectfully requests that its motion for leave to file the annexed brief *amicus curiae*, be granted.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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No. 76-1143

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RAY MARSHALL, SECRETARY OF LABOR, *et al.*, Appellant,  
v.  
BARLOW'S, INC., Appellee.

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On Appeal From The United States District Court  
For The District Of Idaho

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**BRIEF OF THE  
MOUNTAIN STATES LEGAL FOUNDATION  
AS AMICUS CURIAE**

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This brief *amicus curiae* on behalf of the Mountain States Legal Foundation is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

**INTEREST OF THE AMICUS CURIAE**

The interest of the Mountain States Legal Foundation is set forth in its annexed motion for leave to file brief *amicus curiae*.

## SUMMARY OF ARGUMENT

## I.

The historical antecedents of the Fourth Amendment must be given careful attention in any present analysis of the document, inasmuch as the Amendment "was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution." *United States v. Rabinowitz*, 339 U.S. 56, 69 (Frankfurter, J., dissenting). The colonists suffered under the "writs of assistance," by which the throne authorized indiscriminate searches of property to detect contraband in violation of restrictive trade laws. The writs were condemned as "the worst instrument of arbitrary power" by James Otis, Jr. of Boston, in oratory which crystallized colonial opposition to the writs. *Boyd v. United States*, 115 U.S. 616, 625 (1886).

Also prominent in the colonists' minds were parallel developments in England, where warrants had been issued for the purpose of locating the publishers of articles critical of the throne. Warrants specific as to the items sought, but indiscriminate as to the persons and places subjected to it were struck down for creating, as in the subject case, a "discretionary power given to messengers to search wherever their suspicions may chance to fall." Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 45 (1937). In the case of *Entick v. Carrington and three Other King's Messengers*, a warrant specific as to the person but general as to the papers to be seized was also held unlawful. The *Entick* decision was later termed by this Court as "one of the landmarks of English liberty" (*Boyd v. United States*, *supra*, 115 U.S. at 625-626), which "was . . . fresh in the memories

of those who achieved our independence and established our form of government" *Frank v. Maryland*, 359 U.S. 360, 377 (1959).

In examining the Fourth Amendment, it must be emphasized that the Amendment first proscribes "unreasonable searches and seizures," and then goes on to define the restricted authority for a search conferred by a warrant. The first part of the Amendment, not included in the original Amendment proposal, greatly enhanced the scope of protection intended by the Amendment. Indeed, as Mr. Justice Frankfurter explained (*United States v. Rabinowitz*, *supra*, 339 U.S. at 70):

One cannot wrench 'unreasonable searches' from the text and context of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable'.

## II.

The central issue before the Court in this case is whether searches by roving bands of Federal officers, randomly probing for unsuspected violations of the Occupational Safety and Health Act in private business establishments owned by persons entitled to the protection of the Fourth Amendment, are subject to the constitutional preconditions of a search warrant. In addressing this question, it is important to bear in mind that the Fourth Amendment is to be given a "liberal construction," so as to prevent the "gradual depreciation" of rights protected thereunder. *Gouled v. United States*, 255 U.S. 298, 303-04 (1921).

1. Warrantless searches are *per se* unreasonable under the Fourth Amendment, absent a few "jealously and carefully drawn" exceptions. Those who would invoke the exceptions to justify warrantless searches must show "that the exigencies of the situation made that course imperative." *Coolidge v. United States*, 403 U.S. 443, 454-55 (1971).

In *Camera v. Municipal Court*, 387 U.S. 523, 528-29 (1967), this Court reversed the finding of *Frank v. Maryland*, *supra*, and rejected the assertion that Fourth Amendment interests at stake in warrantless administrative searches are merely peripheral. The Court also rejected the finding of *Frank* that the Constitutional requirement of reasonableness in searches was accommodated by safeguards circumscribing the times the inspector could enter, safeguards similarly included in Section 8 of OSHA. As the Court said in *Camera*, "broad statutory safeguards are no substitute for individualized review," 387 U.S. at 533.

In a companion case to *Camera*, the Court held in *See v. City of Seattle*, 387 U.S. 541 (1967), that the constitutional requirement of a search warrant incident to a random search by administrative authorities applies with no less force to searches of business premises. Contrary to the Government, an employer does not lose his legitimate expectation of privacy in his place of business merely by allowing employees and outside parties routinely to enter the premises. The issue is not whether opening commercial premises to one limited class of persons (employees) thereby mandates destruction of legitimate constitutional expectations of privacy towards other classes in general. Rather, the central focus is "whether the area was one in which there was a reasonable expectation of freedom from

governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (emphasis added). *United States v. Chadwick*, — U.S. —, 97 S.Ct. 2476, 2483 (1977).

2. In *See, supra*, the Court was careful to save from application of the warrant requirement those inspections pursuant to "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." 387 U.S. at 546. Thus, *Colonnade Catering Corp. v. United States*, 397 U.S. 774 (1970), sanctions warrantless searches by Federal Treasury agents of licensed liquor dealers' premises for contraband liquor. *United States v. Biswell*, 406 U.S. 311 (1972), similarly sanctions warrantless inspection by Federal Treasury agents of a licensed gun dealer's premises. In both cases, and in subsequent decisions authorizing warrantless administrative searches under the tripartite *Colonnade/Biswell* rationale, the search was approved because the ambit of the search was narrowly focused, the affected industries were historically highly regulated, and there was identified a legislative purpose in regulating businesses engaged in inherently dangerous enterprises.

3. OSHA searches do not fall within the *Colonnade/Biswell* exception to the Fourth Amendment's warrant requirement. First, it is manifestly unfair, and legally incorrect, for the Government to suggest that warrantless OSHA searches of all employers are justified because some workers are imperiled, without regard to the specific nature of the business to be searched nor probable cause to believe that there is a violation. Second, the substantive scope of OSHA regulations is astonishingly broad, covering virtually every real or imaginary danger conceivable. Third, warrant-

less OSHA searches are not limited to licensed, pervasively regulated, or inherently dangerous businesses whose owners, by entering into such enterprises, thereby implicitly consent to a limitation upon their reasonable expectation of privacy. Indeed, OSHA reaches out to virtually every employer in the nation which employs at least one person affecting interstate commerce.

4. The Government contends that warrantless searches are critical to the proper enforcement of the Act, because a warrant requirement might result in advance notice to the employer of the imminent inspection, thus giving the employer the opportunity to conceal otherwise discoverable violations. However, it is simplistic to assert that violations in sophisticated manufacturing or processing operations can be easily concealed, and, in any event, it is unfair to justify the warrantless search of one individual's business because some other individual, in a wholly unrelated business, might attempt to avoid the operation of the statute. Also, it is only "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of a[n offense that] . . . it is reasonable to permit action without prior judicial evaluation." *Roaden v. Kentucky*, 413 U.S. 486, 505 (1973). Moreover, if corrective action were taken in anticipation of an inspection, the remedial purposes of the Act would be served, not frustrated.

In sum, the Government would have this Court extend the *Colonnade/Biswell* implied consent exceptions to the warrant requirement to the point where the exception would become the norm. However, OSHA inspections bear all of the indicia of unconstitutionality found by this Court, as is plain from this Court's repeated refusals to expand *Colonnade* and *Biswell* in

derogation of *Camera* and *See. E.g., Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *G. M. Leasing Corp. v. United States*, — U.S. —, 97 S.Ct. 619 (1977). *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861 (1974).

While this Court should construe a statute "so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of the statute." *Seals v. United States*, 367 U.S. 203, 211 (1961). As found by the Court below, there is no basis to construe a warrant requirement into the OSHA Act. Congress imposed no such requirement, even in the face of a stinging attack by 'he Congressional minority on the absence of warrant protections. See H.R. Rep. No. 91-1291, 91st Cong., 2nd Sess. 55 (1970). The failure to include a warrant provision, in the face of this criticism, strongly suggests that none was intended, and, indeed, was consciously omitted. Moreover, as the Senate Report on the OSHA bill makes clear, the purpose of Section 8(a) was to enable inspection rights, not upon presentment of a warrant, but merely upon presentment of the inspector's credentials. S. Rep. No. 91-1282, 91st Cong., 2nd Sess., 11 (1970). In sum, the search warrant requirement was rejected, and it is for Congress, not the court, to reform that fatal defect in the statute.

### III.

In the event the Court elects to construe the Act so as to comply with the Fourth Amendment by requiring search warrants, the administration of the Act will not be frustrated. Most businessmen, like the home dwellers in *Camera* (387 U.S. at 539), allow OSHA inspectors into their premises. Thus, with respect to the vast

majority of inspections, a warrant requirement will present no obstruction to OSHA. Cf., *Frank v. Maryland*, *supra*, 319 U.S. at 384 (Douglas, J., dissenting). In those cases where consent is denied and the inspection is triggered by an employee complaint or a reported accident, there will assumedly be sufficient cause to justify issuance of a search warrant. In any event, even where advance notice may be given, there usually is no compelling urgency to make the search, since the vast majority of present OSHA searches are "general schedule", random visits. And where the employer corrects the violation upon advance notice, the purpose of the Act is served, not defeated.

## ARGUMENT

### I. THE PRE-CONSTITUTIONAL ANTECEDENTS

The statutory power indiscriminately to search, conferred by the Occupational Safety and Health Act, strikes against the very foundations of liberty which the nation's revolution was designed to secure. A brief review of the pre-constitutional antecedents is, therefore, appropriate.

The pre-colonial English history demonstrates that the principal manifestation of abusive governmental searches involved the throne's attempt to repress critical press commentary by authorizing indiscriminate seizure of books and papers alleged to be libelous or seditious because of their critical comment.<sup>1</sup> For instance, in 1566, the Court of Star Chamber decreed searches of commercial premises "in any warehouse, shop, or any other place where they suspected a viola-

<sup>1</sup> See generally, N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 24-50 (1937).

tion"" in order to seize allegedly seditious books and papers. The obnoxious use of indiscriminate searches was imposed upon the American colonists in the form of the "writs of assistance", by which the throne authorized indiscriminate searches of property to detect contraband in violation of restrictive trade laws.

The death of Charles II caused writs outstanding at the time of his death to expire.<sup>2</sup> Boston merchants, to whom smuggling was a way of life and whose resentment of the writs had long been smoldering, engaged James Otis, Jr., to argue against granting new writs in 1761.<sup>3</sup> Otis condemned the writs as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law book;" inasmuch as they placed "the liberty of every man in the hands of every petty officer."<sup>4</sup>

Otis' oratory crystallized colonial resistance to the oppression of the crown. John Adams, present to take notes on the proceeding, and later to take a leading role in the shaping of the Constitution, wrote of Otis' argument:<sup>5</sup>

<sup>2</sup> *Id.*, at 25.

<sup>3</sup> *Id.*, at 59.

<sup>4</sup> Many years later, John Adams wrote that the purpose of the Writs was to enable officers of the customs to call upon sheriffs "to aid them in breaking open houses, stores, shops, bales, trunks, chests, casks, packages of all sorts, to search for goods, wares and merchandise which had been imported against the prohibitions, or without paying the taxes imposed by certain acts of Parliament, called the Acts of Trade." As quoted in Griffith, *In Defense of Public Liberty* 14 (1976).

<sup>5</sup> Quoted in *Boyd v. United States*, 115 U.S. 616, 625 (1886).

<sup>6</sup> *Tudor, Life of James Otis* (1823). This Court has noted that

"Otis was a flame of fire; with a promptitude of classical allusions, a depth of research, a rapid summary of historical events and dates, a profusion of legal authorities, a prophetic glance of his eyes into futurity, and a rapid torrent of impetuous eloquence, he hurried away all before him. American Independence was then and there born . . . Every man of an immense crowded audience appeared to me to go away as I did, ready to take arms against Writs of Assistance. Then and there, was the first act of opposition, to the arbitrary claims of Great Britain. Then and there, the child Independence was born. In fifteen years, i.e., in 1776, he grew up to manhood and declared himself free."

As colonial resistance to the writs of assistance was emerging, there developed in England a parallel attack on the general warrants historically issued by the crown to suppress editorial criticism. *Boyd v. United States*, *supra*, 115 U.S. at 625-26. The most important of the English developments was John Wilkes' anonymous publication, beginning in 1762, of his series of articles known as the *North Briton*. Number 45 was particularly critical of the throne, and the Secretary of State, in retaliation, issued a warrant which was specific as to the items sought but indiscriminate as to the persons and places subjected to it. It ordered the King's men "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, "The *North Briton*, No.

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Otis' oration against renewal of the writs of assistance occupies a prominent place in the history of the Fourth Amendment; *Frank v. Maryland*, 359 U.S. 360, 364 (1959); *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting); *Boyd v. United States*, *supra*, 115 U.S. at 625.

45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers."'

Upon this indiscriminate authority, the crown arrested forty-nine printers before arresting Wilkes himself. Suit was brought by the printers alleging false imprisonment on grounds that the warrant was unlawfully broad. Finding authority for the "nameless warrant" wanting, Chief Justice Pratt declared that it was "a law under which no Englishman would wish to live an hour."'<sup>7</sup> Upon the similar suit brought by Wilkes, the Chief Justice again found the warrant unlawful, condemning it for creating, as in the subject case, "a discretionary power given to messengers to search wherever their suspicions may chance to fall."'<sup>8</sup> Chief Justice Mansfield affirmed, stating, "It is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give certain directions to the officer."'<sup>10</sup>

The *North Briton* case gave impetus to John Entick, the subject of a warrant which, in contrast to that involved in the *North Briton*, was specific as to the person but general as to the papers to be seized. Entick contested his arrest and the court held the warrant unlawful. That decision was later termed by this Court as "one of the landmarks of English liberty."'<sup>11</sup> Moreover, as this Court observed in *Boyd* and again in

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<sup>7</sup> *Lasson, supra*, at 43.

<sup>8</sup> *Id.* at 44.

<sup>9</sup> *Id.* at 45.

<sup>10</sup> *Entick v. Carrington and Three Other King's Messengers*, 19 How. Se. Tr. 1029 (1765).

<sup>11</sup> *Boyd v. United States, supra*, 115 U.S. at 625-26.

*Frank v. Maryland*,<sup>12</sup> "This history . . . was . . . fresh in the memories of those who achieved our independence and established our form of government."

Indeed, the historical antecedents of the Fourth Amendment must be given careful attention in any present analysis of the document.<sup>13</sup> As Mr. Justice Frankfurter admonished:

<sup>12</sup> *Frank v. Maryland*, *supra*, 359 U.S. at 377.

<sup>13</sup> Indeed, "some provision with regard to search and seizure was assured a place in every state declaration or bill of rights," and "seven different states had constitutional provisions which were to serve as precedents for the Fourth Amendment." *Lasson, supra*, at 80, 82. The first of these, the Virginia Constitution, adopted at Williamsburg in May, 1776, contained the following at Section 10:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

7 *American Charters, Constitutions and Organic Laws* 3814 (F. Thorpe ed. 1906).

On September 28, 1776, the State of Pennsylvania adopted its Declaration of Rights. Section 10 of the Pennsylvania Declaration was the first of the state constitutions "which closely approximated what is now the Fourth Amendment . . . It contained all the elements of the Fourth Amendment, in that it was not merely a condemnation of general warrants like the Virginia clause but also stated [by implication] the broader principle, that is, freedom from unreasonable search and seizure". *Lasson, supra*, at 80-81 (emphasis added):

The Massachusetts Declaration of Rights, enacted in 1780, is particularly significant, because it "offered the first expression of the phrase 'unreasonable searches and seizures' which ultimately found its way into the Fourth Amendment." *Lasson, supra*, at 82. Article XIV stated:

Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously sup-

It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution . . . *United States v. Rabinowitz, supra*, 339 U.S. at 69.

It is important to note, therefore, especially in the subject case, that the Fourth Amendment first proscribes "unreasonable searches and seizures," and then goes "on to define the very restricted authority that even a search warrant issued by a magistrate could give . . ." *United States v. Rabinowitz, supra*, 339 U.S. at 70 (Frankfurter, J., dissenting). As originally proposed, the Amendment forbade searches without warrants and merely limited the scope of the warrant. The warrant had to be based upon probable cause, a description of the person or place to be searched had to be stated, and assurance for compliance with these requirements was entrusted to a detached magistrate.<sup>14</sup> But while prescribing warrant requirements, the original Amendment proposal still contained no affirmative guarantee from unreasonable searches. The first part of the Amendment, affirmatively assuring that freedom, was added to cure that defect. This addition greatly enhanced the scope of protection intended by the Amendment, and makes clear that the Fourth

ported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or arrest one of more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities prescribed by the laws. *Thorpe, supra*, at 1891.

<sup>14</sup> *Lasson, supra*, at 101, 120.

Amendment proscribes all unreasonable searches and seizures, and is not to be viewed merely as a requirement for, and a guide to the form of, search warrants.<sup>15</sup> As Mr. Justice Frankfurter explained:<sup>16</sup>

One cannot wrench 'unreasonable searches' from the text and context of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable'.

Against this history the Fourth Amendment emerged which, as characterized by Justice Frankfurter in *Frank v. Maryland, supra*, 359 U.S. at 365, embodied no less than "the right to shut the door on officials of the state unless their entry is under proper authority of law."

<sup>15</sup> This Court noted recently that the colonial history reveals "an absence of a contemporary outcry against warrantless searches in public places . . . because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America." *United States v. Chadwick*, — U.S. —, 97 S. Ct. 2476 (1977). Nevertheless, the Court rejected the Government's contention in *Chadwick* that the Fourth Amendment warrant clause was therefore intended to apply only to intrusions into the home. Said the Court, in comments particularly applicable in the instant case:

What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth. 97 S. Ct. at 2482.

Analytically, it is, to say the least, extremely difficult to distinguish the impact upon the citizen's privacy stemming from random government searches conducted pursuant to general warrants, which were condemned strongly during colonial times, and the random government searches now conducted pursuant to the general authority claimed under the OSHA Act by the Secretary of Labor.

<sup>16</sup> *United States v. Rabinowitz, supra*, 339 U.S. at 70.

The seeds of independence forecast by Adams after Otis' argument against the writs of assistance finally matured. The Declaration of Independence thus scored the Crown: "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their substance." And now, on the second bicentennial celebration of the Declaration, swarms, indeed, thousands, of OSHA inspectors, relying on statutory authority, strikingly similar to that possessed by the crown's officers, inspected no less than eighty-eight thousand businesses in 1975.<sup>17</sup> As was the case with the writs of assistance, these invasions of private property are not predicated upon probable cause, assessment by a neutral magistrate, nor upon a warrant specifying the persons or places to be searched; they are, instead, based upon a similar statutory roving commission to investigate whatever the officer in the field determines, in his discretion, to be a suitable object to be subordinated to the exercise of such powers. These are, however, precisely the vices the Fourth Amendment was intended to prevent.

**II. SEARCH WARRANTS ARE A CONSTITUTIONAL PRE-REQUISITE TO ADMINISTRATIVE SEARCHES BY LAW ENFORCEMENT OFFICERS. ABSENT NARROW EXCEPTIONS NOT APPLICABLE TO EMPLOYERS SUBJECT TO THE OCCUPATIONAL SAFETY AND HEALTH ACT.**

The central issue before the Court in this case is whether searches by roving bands of Federal officers, randomly probing for unsuspected violations of the Occupational Safety and Health Act in private business establishments owned by persons entitled to the protection of the Fourth Amendment, are subject to

<sup>17</sup> 5 Occ. Saf. & Health Rptr. (BNA) 1304.

the constitutional precondition of search warrant. The question, of course, is far broader than the constitutionality of the Occupational Safety and Health Act (hereinafter cited as "OSHA Act"), for, in an age of increasing numbers of regulatory statutes,<sup>18</sup> many authorizing new, self-contained administrative "police forces" like OSHA, the fundamental question presented is whether the Fourth Amendment protection—"the very essence of constitutional liberty"—shall receive, as this Court commanded half a century before the OSHA Act, "a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of the courts or by well intentioned, but mistakenly overzealous executive officers." *Gouled v. United States*, 255 U.S. 298, 303-04 (1921) (footnote omitted).

#### A. The Orienting Principles.

We begin with the following proposition, enunciated by this Court in *Coolidge v. United States*, 403 U.S. 443, 454-55 (1971):

[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption \* \* \* that the exigencies of the situation made that course imperative.' (Footnotes omitted).

<sup>18</sup> See Brief for the Appellants, n.25 (hereinafter cited as "Govt. Br.').

Accord: *Camera v. Municipal Court*, 387 U.S. 523, 528-29. See also *Cady v. Dombrowski*, 413 U.S. 433, 439; *United States v. United States District Court*, 407 U.S. 297, 314-21; *Katz v. United States*, 389 U.S. 347, 357. It "has been settled law in this Court for over ninety years \* \* \* that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable *government* invasions of legitimate privacy interests." *United States v. Chadwick*, *supra*, 97 S. Ct. at n.9, 2483 (emphasis added).

This Court rejected the argument in *See v. City of Seattle*, 387 U.S. 541 (1967), that citizens have lesser privacy interests in their business establishments than they do in their homes, and that a different standard of reasonableness applies to searches of homes than to places of business. The Court affirmed instead that:

The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant. *Id.* at 543.

With these principles in mind, we examine the Government's contention that "interests that implicate 'the essential purpose of the Fourth Amendment' " are not at stake here, and that accordingly there is "no necessity to invoke the most stringent protections of the Amendment." Br. at 29.

#### B. The General Rule: *Camera* and *See*

*Camera v. Municipal Court*, 387 U.S. 523 (1967) involved prosecution of an apartment leasee for refus-

ing to allow city housing inspectors access to his premises absent a search warrant. The City, contending no warrant was necessary, relied upon the San Francisco Housing Code, which provided:

"Sec. 503 Right To Enter Building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

This provision of the San Francisco ordinance struck in *Camera* is, significantly, similar to Sec. 8(a) of the OSHA Act here involved (29 U.S.C. 657(a)):

"Sec. 8(a). In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

Finding this warrantless administrative search procedure constitutionally infirm, the Court reiterated in *Camera*:

"[O]ne governing principle, justified by history and current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." (387 U.S. at 528).

Reversing the finding of *Frank v. Maryland, supra*, the Court rejected the assertion that Fourth Amendment interests at stake in these inspections are merely peripheral, noting, to the contrary, that criminal sanctions were a possible outgrowth of such inspection. 387 U.S. at 530-31. Contrary to the Government (Br. pp. 33-4), that consideration is certainly no less applicable under OSHA, given that under Section 17(e) of the Act, willful non-compliance with the regulations issued by the Secretary can, in certain circumstances, result in imprisonment up to six months for a first offense, and one year for a second offense.<sup>19</sup> And, in any event, the Government "misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions. \* \* \* The Fourth Amendment has a much wider frame of reference than mere criminal prosecutions." *Frank v.*

<sup>19</sup> In *Wyman v. James*, 400 U.S. 309, 324-25 (1971), the Court held *Camera* and *See* warrant requirements inapplicable to home visits of welfare officers to applicants of certain welfare programs. The Court noted that the program benefits were voluntarily applied for, and that *Frank*, *Camera*, and *See* all arose in the context of a criminal prosecution for denying access to government inspectors. While the OSHA Act does not directly provide for criminal prosecution of employers who refuse access, OSHA obtains "inspection warrants" against the offender, for which refusal of compliance results in an arrest warrant. *OSHA v. Gilbert & Bennett Mfg. Co.*, — F.Supp. —, 5 Occ. Saf. and Health Rptr. (BNA) 1375 (N.D., Ill., May 3, 1977).

*Maryland, supra*, 359 U.S. at 376, 377 (Douglas, J., dissenting).<sup>20</sup>

Next, the Court in *Camera* rejected the finding of *Frank* that the Constitutional requirement of "reasonableness" in searches was accommodated by safeguards circumscribing the times the inspector could enter—safeguards similarly included in Sec. 8 of the OSHA Act and again relied upon by the Government here (Br., p. 18). But "broad statutory safeguards are no substitute for individualized review." 387 U.S. at 533. Such considerations "unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment" (387 U.S. at 532): that of advising the citizen, upon the assurance of a neutral magistrate, that inspection of the premises is authorized by statute, that the inspector is properly authorized to make the search, and advising the citizen of the limits of the search authority; in short, that the citizen need not subject his property to random search simply upon the self-asserted authority of a roving inspector who may later prosecute him.<sup>21</sup> Considering these vices, the Court declared in *Camera*, 387 U.S. at 532-33:

<sup>20</sup> "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." *District of Columbia v. Little*, 178 F.2d 13, 17 (C.A.D.C. 1949) (per Prettyman, J), affirmed on other grounds, 339 U.S. 1 quoted in *Frank v. Maryland, supra*, 359 U.S. at 378. (Douglas, J., dissenting).

<sup>21</sup> See generally *Coolidge v. New Hampshire, supra*, 403 U.S. at 450: "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigation . . ."; *United States v. United States District Court*, 407 U.S. 297, 316 (1972): "The Fourth Amendment does not contemplate the executive officers of Government as neutral and detached magistrates . . . The historical judgment, which the Fourth Amendment

"The practical effect of this system is to leaving the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."

Thus, contrary to the Government's assertion that "a magistrate would provide no meaningful safeguard in the present context" (Br. pp. 14-5), the Court's analysis in *Camera* compels the opposite conclusion—a conclusion only recently reinforced by the Court in *U.S. v. Chadwick, supra*, relying upon *Camera*.

As set forth above, in a companion case to *Camera*, the Court declared in *See v. City of Seattle, supra*, that the constitutional requirement of a search warrant incident to a random search by administrative authorities applies with no less force to searches of business premises (387 U.S. at 543):<sup>22</sup>

[W]e see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimal physical standards for commercial premises.

\* \* \*

accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and speech." (Footnote omitted.); *Frank v. Maryland, supra*, 359 U.S. at 382 (Douglas, J., dissenting): "History shows that all officers tend to be officious; and health inspectors, making out a case for criminal prosecution of the citizen, are no different."

<sup>22</sup> The Government asserts that the principles of *See* are inapplicable because that case involved a locked warehouse (Br. p. 32). That fact was not even recognized by this Court in its decision and is obviously of no significance.

*Camera* and *See* thus reflect the command of the Fourth Amendment that administrative agency inspections of private commercial premises are unconstitutional where not consented to, in the absence of a search warrant issued by a neutral and detached magistrate, which serves the beneficent purpose of assuring the occupant of the authority for, and limits of, the inspector's search.

The core of the Government's effort to distinguish the instant case from the teachings of *Camera* and *See* is its argument that "there are areas of a commercial building in which the owner does not have a significant expectation of privacy from reasonable, limited-purpose" inspections during business hours." (Br. pp. 28-29). This is so, the Government contends, because "routine occupation by the owner's employees and the frequent visits by . . . outside parties" such as deliverymen "effectively diminish any claim of privacy by the factory owner with respect to such area . . . ." *Id.* This argument is unresponsive to the constitutional infirmity in the OSHA Act. First, while the Government appears to concede that there are some areas of a commercial establishment wherein the owner retains a legitimate privacy interest, Section 8(a) of the OSHA Act makes no such distinction, inasmuch as it purports to authorize the OSHA Compliance Officer to search "any . . . area . . . where work is performed by an employee of an employer." (Emphasis added). Second, the con-

<sup>23</sup> The right of privacy protected by the Fourth Amendment "is not conditioned upon the objective, the prerogative or the stature of the intruding officer. . . . It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite." *District of Columbia v. Little, supra*, 178 F.2d at 17 (Prettyman, J.), quoted in *Frank v. Maryland, supra*, 359 U.S. at 378 (Douglas J., dissenting).

tention misperceives the relevant constitutional concern. The issue is not whether opening commercial premises to one limited class of persons (employees) thereby mandates destruction of legitimate constitutional expectations of privacy towards other classes in general. Rather, the central focus is "whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (emphasis added); *United States v. Chadwick, supra*, 97 S.Ct. at 2483.

Thus, in *Mancusi*, for instance, a large open area shared by the defendant union officer with other union officials was searched by officials without a warrant. Rejecting the argument that the defendant had surrendered his expectations of privacy from government intrusion because he had shared the area with other business invitees, the Court stated (392 U.S. at 369):

DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, . . . This expectation was inevitably defeated by the entrance of state officials . . .

Similarly, when an employer opens his non-public premises to employees, he does not thereby surrender his legitimate expectations of privacy from governmental intrusion.<sup>24</sup> The latter causes a dislocation of

<sup>24</sup> Moreover, the search conducted under OSHA is not confined to a search by regularly employed government officials. Non-governmental representatives are also authorized to join in the inspection. The provisions of Section 8(e) of the Act, 29 U.S.C. 657(e), provide that a "representative" of the employees, and the employees themselves, "shall be given an opportunity to accompany the" Compliance Officer on his walkaround inspection. To the extent that an employee representative must be invited to assist in the warrantless inspection, his presence in that capacity is an invasion of the em-

property rights of a totally different order. Indeed, subject to certain carefully circumscribed situations discussed *infra*, the owners of the nation's businesses have historically been free from unannounced random searches by roving Government agents. Such government intrusions are, therefore, and have historically

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ployer's legitimate privacy interest, and is subject to the Fourth Amendment proscriptions. For, "where the search is made at the behest of or with the assistance of law enforcement officers, there must be probable cause, and in appropriate instances an authorizing warrant, if the search is to pass constitutional muster." *United States v. Pryba*, 502 F.2d 391, 398 (C.A.D.C. 1974), cert. denied, 419 U.S. 1127. Accord: *United States v. Mekjian*, 505 F.2d 1320, 1327 (5th Cir. 1974). "A search is a search by a federal official if he had a hand in it." *Lustig v. United States*, 338 U.S. 74, 78 (1949).

The impact on the Fourth Amendment reasonableness of the government's search caused by the authorization granted under the Act to non-government personnel (i.e., employees and their representatives) under Section 8(e) is not commented on or even mentioned by the Government in its brief. However, upon obtaining its search order in the instant case, the Secretary, pursuant to its own rules, would have given this statutorily authorized class an opportunity to participate in the search. (See Appendix, p. 7; 29 C.F.R. § 1903.8).

Collaterally, it should be noted that OSHA recently renewed its demand that employers continue to pay the wages of employees engaged in this effort. *Occ. Saf. and Health Rptr. (BNA)*, Vol. 7 No. 12 (August 18, 1977). But see, *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (C.A.D.C. 1975).

When a citizen engages in normal business pursuits, employees generally are required. Historically, the act of engaging employees has not constituted a waiver of Fourth Amendment privacy rights. Yet this is exactly what implicitly occurs as a result of Section 8(e) of the Act. Cf. *Lloyd v. Tanner*, 401 U.S. 562 (1972), where the Court held that the shopping center owner's opening of his premises to shoppers did not vest a First Amendment right in war protesters to handbill on those premises, inasmuch as the limited invitation to shoppers was not tantamount to an invitation to the general public for other purposes. See also *Hoffa v. United States*, 388 U.S. 895, 301-02 (1966).

been, unreasonable<sup>23</sup> and hence, unconstitutional. Accordingly, the citizenry is to be insulated from them, unless based upon a search warrant, or upon exigent circumstances justifying search without a warrant.

### C. The Exigency Exception to the General Rule: *Colonnade and Biswell*

In *See, supra*, the Court was careful to save from application of the warrant requirement those inspections pursuant to "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." 387 U.S. at 546. Those exceptions were later dealt with by the Court in *Colonnade and Biswell*.

*Colonnade Catering Corp. v. United States*, 397 U.S. 774 (1970), sanctioned warrantless search by Federal Treasury agents of licensed liquor dealers' premises for contraband liquor. *United States v. Biswell*, 406 U.S. 311 (1972) similarly sanctioned warrantless inspection by Federal Treasury agents of a licensed gun dealers' premises. Both cases stressed common justification for the warrantless search. In both, the ambit of the search was narrowly focused; in one case for untaxed liquor; in the other for unlicensed guns: "The dealer is not left to wonder about the purposes of the inspector or the limits of his task" (*Biswell*, 406 U.S. at 316). Both cases also stressed that the affected industries were historically highly regulated. The liquor industry had been subject to warrantless inspection and regulation both before and after the Fourth Amend-

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<sup>23</sup> "[T]he reasonableness of a search can be determined independently of the warrant requirement." Note, "The Law of Administrative Inspections: Are Camera and See Still Alive and Well?" 1972 Wash. U. L. Rev. 313, 315 (1972).

ment was enacted (*Colonnade*, 397 U.S. at 75). "We deal here with the liquor industry long subject to close supervision and inspection" (*Id.*, 397 U.S. at 77). Similarly, in *Biswell*, *supra*, 406 U.S. at 316, the Court stressed the "pervasively regulated business" of gun dealers. The legal consequence of this history of regulation, implicitly stated in *Colonnade* and expressly stated in *Biswell*, was that persons entering such business do so with such attenuated expectations of privacy from government inspection and thereby implied consent to warrantless inspection. *Biswell*, 406 U.S. at 316; *Colonnade*, 397 U.S. at 77.

The final thread common to both cases was a related legislative purpose in regulating business engaged in an inherently dangerous enterprise: "[C]ongress has been most solicitous in protecting the revenue against various types of fraud . . ." (*Colonnade*, 397 U.S. at 75); "[I]t assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers . . ." *Biswell*, 406 U.S. at 316.

#### D. The Progeny of *Colonnade* and *Biswell* Demonstrates The Narrowness of Their Application

Each of the cases authorizing warrantless administrative searches under the *Colonnade/Biswell* rationale have been consistent with the tripartite rationale for the warrantless search exception. In each the focus of the inspection was narrow; the employer was in a licensed or pervasively regulated industry and thereby was deemed to have an attenuated privacy interest; and the offender was usually in a potentially dangerous enterprise.

Thus, in *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682 (C.A. 2, 1974) cert. denied sub. nom. *Terraciano v. Smith*, 419 U.S. 875, warrantless seizure of a pharmacist's records of narcotic and stimulant drugs was sustained because the subject statute was narrowly directed to search of a limited class of records for a limited class of drugs in an industry subject to "intensive regulation." 493 F.2d at 685. Similarly, in *United States v. Del Campo Baking Mfg. Co.*, 345 F.Supp. 1371 (D.Del., 1972), warrantless search of the defendant food processor's premises for adulterated food was sustained because of the demonstrable Congressional interest in quickly interdicting tainted food. 345 F.Supp. at 1376 n.12. Further, relying on *Biswell*, the Court stated (345 F.Supp. at 1371):

The thrust of the (*Biswell*) opinion is that there is no issue of consent to a regulatory inspection conducted without a warrant when such a compliance inspection is authorized by a statute in a 'pervasively regulated business.'

Finally, in *Youghioghenny and Ohio Coal Co. v. Morton*, 354 F. Supp. 45 (S.D. Ohio, 1973) (three-judge court), warrantless inspections under the Coal Mine Health and Safety Act of 1969 were sustained because of the history of intense Federal regulation of coal mines since 1910. Given the "historicity of such regulation" and the resulting attenuated expectation of privacy of the mine owners, and the inherently dangerous nature of the coal mining industry, the *Biswell* exception was held to apply.<sup>26</sup> The Court was careful

<sup>26</sup> Further, as observed by the Court in *Brennan v. Gibson's Products, Inc. of Plano*, 407 F. Supp. 154, 161 (E.D. Tex. 1976), appeal pending (C.A. 5, No. 76-1526), distinguishing *Youghioghenny*, the focus of the Mine Safety Act is narrow, whereas the focus of the OSHA Act is virtually unlimited.

to admonish, however, that "Our view might be entirely otherwise were we not dealing with a business context of a nearly inherently dangerous type." 364 F. Supp. at 52 n. 7.

**E. OSHA Searches Do Not Fall Within Any Exception to the Fourth Amendment's Warrant Requirement.**

In support of its contention that the instant case is controlled by *Colonnade* and *Biswell* and their progeny, the Government asserts that there are several exigent circumstances sufficient to justify an exception to the Fourth Amendment warrant requirement for OSHA searches. To begin with, there is implicit in the Government's reliance, near the opening of its brief, upon Congressional findings concerning industrial accident statistics, the thinly veiled suggestion that only this Court's approval of warrantless OSHA searches can save American workers from being exposed to safety and health hazards. (Br. pp. 4-5 n.2).<sup>27</sup> We do not

<sup>27</sup> The joint *amicus* brief of the Sierra Club, OCAW Union, and Friends of the Earth, while conceding that warrantless searches are presumptively unreasonable in all but "'certain carefully defined classes of cases' *Camera v. Municipal Court*, 387 U.S. 523, 528-9 (1967)" (Br. p. 6), such as those relating to border searches, automobile searches, searches in "open fields," and those incident to arrest, argues that this circumscribed class should include administrative regulatory public health safety searches where the urgency of the federal interest outweighs the threat to individual expectations of privacy. Initially, the premise that those narrow exceptional situations are applicable to the extremely broad inspection privilege advanced here, is dubious. In any event, even assuming the propriety of this test, its application does not militate in favor of the abrogation of the constitutional expectation of privacy it would entail. For, the "urgency" relied upon is not one of the need for *speed* in inspections, but only in having inspections at all. Indeed, OSHA's own records indicate that only a small fraction of the citations it has issued are "serious" while most are "non-serious." And while the *amici* argue, for instance, that industrial pollutants

dispute that the problems of occupational safety and health are significant, and we heartily endorse the notion that the matter properly is one for profound nationwide concern.<sup>28</sup> However, the Government's argument ignores the countervailing concern that the Fourth Amendment is intended to protect individuals from unreasonable searches and seizures by their Government. Also, in attempting to implicate all employers by association in the accusation that employees everywhere are in danger, and that invasion of all employers' privacy is therefore permissible, the Government ignores the well-established proposition that, in assessing the reasonableness of a particular search, the legitimate privacy interests of the particular individual involved must be evaluated, and balanced against the competing Government interest. It is manifestly unfair, and legally incorrect, to suggest that warrantless OSHA searches of all employers are justified, because some workers are imperiled, without regard to the specific nature of the business to be searched, nor probable cause to believe that there is a violation. We respectfully urge that the Court bear in mind the in-

are not readily detectable by employees, requiring inspections not triggered by probable cause, they fail to recognize that probable cause may be established in numerous other ways (*infra*, pp. 46-47), and, significantly, do not contest that a warrant requirement, even assuming it was accompanied by notice, would permit hiding this sort of violation.

<sup>28</sup> The issue, however, is not as clear cut as suggested by the Government. Severe and seemingly legitimate criticism was directed at the industrial accident statistics relied upon by the majority of the House Committee on Education and Labor in reporting favorably on H.R. 16785. Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 1st Sess. (1971), 887-88 (hereinafter cited as "Leg. Hist.").

terests of the individual in this regard, and hold that warrantless searches premised upon the broad assumption implicit in the Government's position are unreasonable.

Second, the Government asserts that the substantive scope of OSHA searches is not impermissibly broad, because it focuses on matters limited to employee safety and health. However, the substantive focus of OSHA regulations is not narrow like the liquor regulation in *Colonnade*, the firearms control in *Biswell*, the drug control in *Terraciano*, or the adulterated food control in *DelCampo*. To the contrary, the substantive scope of OSHA regulations is nothing short of blunderbuss in approach. There are, literally, tens of thousands of regulations which have poured out of OSHA,<sup>29</sup> which seek to regulate virtually every real or imagined danger conceivable.<sup>30</sup> The regulations seemingly are cognizant of no limit.<sup>31</sup>

<sup>29</sup> See, e.g., 29 C.F.R. Part 1910 (Occupational Safety and Health Standards for General Industry); and 29 C.F.R. Part 1926 (Occupational Safety and Health Standards for Construction).

The astonishing number and diversity of the regulations to which employers are subject under OSHA was demonstrated graphically when, in 1972, Senator Carl Curtis requested the Library of Congress to provide him with a copy of every standard incorporated in OSHA regulations by virtue of the Secretary's temporary authority, under Section 6(a) of the Act, 29 U.S.C. 655(a), to adopt as OSHA standards pre-existing industry consensus standards. After one week of work, the combined resources of the Library of Congress, the Department of Labor, and the Senator's staff could produce only two-thirds of the written regulations, and those documents alone stood four feet high. Small Business and the Occupational Safety and Health Act of 1970: Hearings before the Subcomm. on Environmental Problems Affecting Small Business of the Select Comm. on Small Business, 92d Cong., 2d Sess. 77-79 (1972) (statement of Senator Carl T. Curtis).

<sup>30</sup> There are, for instance, approximately twelve pages of fine-

Third, the Government's contention to the contrary notwithstanding, the warrantless searches made by OSHA are not limited to licensed or pervasively regulated employers, who by entering certain enterprises thereby implicitly consent to a limitation upon their reasonable expectation of privacy. Nor are the warrantless searches confined to industries determined to be inherently dangerous. Cf., *Youghioghenny and Ohio Coal Co. v. Morton*, *supra*, 364 F. Supp. at 52 n.7. Indeed, OSHA reaches out to virtually every employer in the nation which employs at least one person in interstate commerce<sup>32</sup> in businesses which may be in no way federally licensed or specially federally regulated. As noted in *Brennan v. Gibson's Prod. Inc. of Plano*, 407 F. Supp. 154, 161 (E.D. Tex. 1976) (appeal pending C.A. 5, No. 76-1526):

Made subject to [OSHA's] warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all 'environments' where these employees work. It thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barber shops—indeed, the whole spectrum of unrelated and disparate activities which com-

print regulations governing standards for ladders used in general industry. 29 C.F.R. §§ 1910.25, 26, 27.

<sup>31</sup> Indeed, the OSHA Act authorizes searches for violations of the general duty clause, Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), to cover any conceivable situations not addressed by the standards.

<sup>32</sup> Thus, in introducing the Conference reported version of the OSHA bill as finally enacted, Congressman Steiger proclaimed that, "[t]he coverage of this bill is as broad, generally speaking, as the authority vested in the Federal Government by the Commerce Clause of the Constitution." Leg. Hist. 1216.

pose private enterprise in the United States  
(Footnote omitted.)

In its effort to convince the Court that this case is controlled by the *Biswell-Del Campo* rationale, the Government suggests that pervasive federal regulation of workers' safety and health is nothing new, and "that at least two generations of employers have been subjected to extensive federal regulation of employee safety and health." Br. 43. However, the mere enactment of the OSHA statute undermines the Government's contention, for if industry had previously been subject to pervasive federal safety and health regulation, there would have been no need for the statute. Further, the Government's contention appears to be at odds with the understanding of one of the Act's sponsors, Representative Steiger, who declared, upon submitting the Conference-reported bill to the House: "[I]n this session of Congress the House and Senate have passed for the first time in our Nation's history comprehensive occupational safety and health legislation." Leg. Hist. 1216. Plainly then, regulation of the scope contemplated by OSHA is unprecedented in this nation, and it is a misreading of history to suggest that the legitimate privacy interests of employers in all industries have been lessened by a pattern of pervasive federal regulation of employee safety and health.<sup>33</sup>

<sup>33</sup> It is likewise inaccurate to say that such state or industry regulation of safety and health as may have existed before enactment of the OSHA statute justifies the conclusion that there is a long history of pervasive regulation of employee safety and health. See Govt. Br., at 43 n.23. Indeed, Section 18 of OSHA, 29 U.S.C. 667, which divested the States of jurisdiction over safety and health matters, pending the Secretary's approval of state safety and health plans, was enacted in response to Congress' judgment that state regulation had been historically inconsistent. See, e.g., Leg. Hist. 144, 161, 342-

Fourth, the Government contends that warrantless searches are critical to the proper enforcement of the OSHA Act, because a warrant requirement might result in advance notice to the employer of the imminent inspection, thus giving the employer the opportunity to conceal otherwise discoverable violations. To begin with, the Government's assertion in this regard reveals again the danger inherent in any effort to paint American industry with one broad brush for purposes of constitutional analysis. The OSHA statute purports to regulate all kinds of businesses, from the smallest retail shop to the most massive refinery. It is simplistic to assert that the imposition of a warrant requirement would enable the operator of a multi-million dollar chemical processing plant, for example, to conceal on short notice, employee exposure to impermissible levels of air contaminants, unless the operator simply shuts down the extraordinarily expensive operation. It is not as if the processor, like the operator of a less complicated business, can simply move his few employees elsewhere, thus allowing maintenance of expensive equipment to lapse, or alter some small physical structure to conceal on OSHA violation. Yet the Government's analysis would hold that the privacy interests of the former must fall because citation avoidance techniques may be more readily available to the latter. Once again, the analysis is unfair, and ignores the par-

343, 861. The Government's reliance (Br. 43) on the Walsh-Healey Act of 1936, 41 U.S.C. 35 *et seq.*, is also misplaced, given that compliance with the very state safety standards found insufficient by Congress in enacting OSHA is "prima facie evidence of compliance" with Walsh-Healey, 41 U.S.C. 35(e). Moreover, Walsh-Healey and OSHA are plainly distinguishable, inasmuch as the former had "never been enforced in the absence of specified standards." Leg. Hist. 880.

ticular circumstances and privacy interests of the individuals who are the subject of OSHA searches.

In any event, this Court has determined that, with regard to the claim that Fourth Amendment protections must fall in order to prevent the destruction of incriminating evidence, it is only "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of a[n] offense that] . . . it is reasonable to permit action without prior judicial evaluation." *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). In announcing this principle, the Court rejected the assertion that exigent circumstances justify a warrantless search and seizure of an obscene film, simply because the film "may be compact, easy to destroy or to remove to another jurisdiction, and may be subject to pretrial alterations by cutting out scenes and resplicing reels." *Id.* at 505 n.6. That the film was scheduled for regular exhibition to the public was deemed sufficient to support the conclusion that the procuring of a warrant need not result in the loss of evidence. Applying this analysis in the instant case, to justify warrantless OSHA searches would require the assumption that employers would discontinue regularly scheduled operations to conceal OSHA violations, an assumption of highly doubtful validity, indeed. Accordingly, even assuming, unrealistically, that most OSHA violations are capable of quick concealment, the possibility of such subterfuge does not justify the conclusion that warrantless OSHA searches are uniformly permissible;<sup>34</sup> in any event, even if such

<sup>34</sup> Moreover, most businessmen, like the home dwellers in *Camera*, *supra*, 387 U.S. at 539, allow OSHA inspectors into their premises. "Submission by the overwhelming majority of the populace indicates that there is no peril to the [safety and] health program." *Frank v. Maryland*, *supra*, 359 U.S. at 394 (Douglas, J., dissenting).

corrective action were taken, the remedial purposes of the Act would be encouraged, not frustrated.

In sum, the Government would have this Court extend the *Colonnade-Biswell* implied consent exceptions to the warrant requirement to the point where the exception would become the norm.<sup>35</sup> For, "It is the consent exception that has been potentially expanded to the point of swallowing the constitutional safeguard intended as the general rule." Note "the Law of Administrative Inspections", *supra*, 1972 Wash. U. L. Rev. at 332. Indeed, the inescapable implication inherent in the Government's position is that, by entering into any business in the United States, an individual loses his otherwise legitimate privacy interests to a degree sufficient to justify warrantless administrative searches of his place of business. The Government is sufficiently concerned with this implication, as it should be, to take pains expressly to deny it (Br. 44), but it cannot be avoided. In any event, warrantless OSHA inspections bear all of the indicia of unconstitutionality found by this Court: the roving bands of inspectors probing private property on their own initiative and in their own discretion; the absence of assurance to the occupant by a neutral magistrate that the inspector is authorized to inspect private property, nor what the limits of his powers are. And for those few brave enough to resist, an arrest warrant may well follow.<sup>36</sup> These considerations, together with

<sup>35</sup> The Secretary urged the same extension of the *Colonnade-Biswell* exception in *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D. New Mexico, 1976) appeal pending, (C.A.10, No. 76-2020). However, after reviewing *Camera*, *See* and their progeny, the Court rejected the Secretary's argument.

<sup>36</sup> *OSHA v. Gilbert & Bennett Mfg. Co.*, *supra*, at n.19.

the very breadth of the Act which touches employers never before subject to such federal regulation, and the corresponding potential for abuse, compels adherence to, rather than departure from, the Fourth Amendment.

#### F. The Vitality of *Camera* and *See*

The propriety of the conclusion that warrantless OSHA searches are unconstitutional is confirmed by this Court's repeated refusals to expand *Colonnade* and *Biswell* in derogation of *Camera* and *See*. See *Dunlop v. Hertzler Enterprises, Inc.*, *supra*. Indeed, the narrowness accorded the *Colonnade* and *Biswell* decisions, as *Terraciano*, *Del Campo*, and *Youghiogheny* demonstrate, is consistent with the mandate of this Court that exceptions to the constitutional warrant requirement are "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958).

Thus, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court held violative of the Fourth Amendment warrantless searches of automobiles made without probable cause by roving patrols of the U.S. Border Patrol near the U.S. border.<sup>37</sup> Rejecting the Government's reliance upon *Colonnade* and *Biswell*, the Court emphasized the narrow scope of the holding in those cases (413 U.S. at 271):

<sup>37</sup> The *Almeida* holding was extended to proscribe stopping of automobiles near the border solely for questioning of its occupants by roving patrols of the U.S. Border Patrol. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). *Almeida* was distinguished in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), where the Court sustained warrantless stopping of autos for checks at fixed point border patrol stations. The Court cited the lesser expectation of privacy in autos, the minimal nature of the intrusion, and the advance knowledge of the occupant that he would have to pass through the check point.

A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him.

Rather, the Court saw in *Almeida* the same sources of concern that the *Camera* and *See* decisions were predicated upon (413 U.S. at 270):

The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camera* when it insisted that the 'discretion of the officer in the field' be circumscribed by obtaining a warrant prior to the inspection. (Footnote omitted.)

In *G. M. Leasing Corp. v. United States*, — U.S. —, 97 S.Ct. 619, 628-31 (1977), the Court held invalid, under the Fourth Amendment, a warrantless search of business premises by Internal Revenue Service agents. Again the Government attempted to come within the cloak of *Colonnade* and *Biswell*. Again the Court rejected that assertion, pointing out that the defendant was neither in a highly regulated industry nor one implicitly open to inspection because of the nature of the industry involved. 97 S. Ct. at 629. Returning to the rule of *Camera* and *See*, the Court reiterated that warrantless inspections are constitutionally impermissible "except in certain carefully defined classes of cases . . .". *Id.* at 628.

Finally, in *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), a

Colorado health inspector entered the outdoor premises of the company without a warrant, and took an air sample to check compliance with Federal Environmental Protection Agency air quality standards. The Court found no Fourth Amendment infringement because the inspection took place on premises open to the public and the air pollutants could be observed from miles away.<sup>28</sup> Upon the basis that the search did not pertain to any of the interior premises or equipment of the company, the Court accordingly concluded (416 U.S. at 864): "We adhere to *Camera* and *See* but we think they are not applicable here. The field inspector did not enter the plant or offices." The subject case, in

<sup>28</sup> The *amicus* brief of the *Sierra Club, et al.*, argues that affirmance of the decision below "would have a devastating effect on the Federal Government's pollution control and public health protection efforts in many other areas" (Br. pp. 13-14, and Appendix II thereto). This, of course, is questionable, and, in any event, the point is not controlling here since the industries subjected to pollution control statutes are highly regulated, the nature of the search is narrow, or the industry involved is inherently dangerous. Moreover, the constitutionality of the statutes to which the *Amici* refer will have to be determined in cases other than this one. Affirmance of the Decision below, therefore, will not reach, let alone have any devastating impact, on these areas of the *amici's* concern.

In this regard, it is well to be wary, as Mr. Justice Douglas has warned, of the claim that certain public purposes somehow take precedence over all others, so as to justify abandonment of the Fourth Amendment (*Frank v. Maryland, supra*, 359 U.S. at 382 (Douglas, J., dissenting)):

One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. As we have seen, searches were once in their heyday when the government was out to suppress the nonconformists. That is the true explanation of *Entick v. Carrington* . . . It would seem that the public interest in protecting privacy is equally as great in one case as in another.

contrast, presents the converse of *Western Alfalfa*, and the logic of the Court's reasoning therein supports the propriety of the conclusion that OSHA inspections of private commercial premises come within the warrant requirement of *Camera, See*, and the Fourth Amendment.

### III. THE THREE-JUDGE COURT BELOW PROPERLY RULED THAT SECTION 8(a) OF THE ACT SHOULD BE DECLARED UNCONSTITUTIONAL.

The three-judge Court below declared Section 8(a) of the OSHA Act unconstitutional. The three-judge Court in *Brennan v. Gibson's Products, Inc. of Plano supra*, 407 F. Supp. at 162-163, and the Court in *Dunlop v. Hertzler Enterprises, Inc., supra*, while in agreement that warrantless searches by OSHA inspectors are impermissible, construed the statute as to require a warrant rather than declare the provision unconstitutional. While this Court has declared that its task is to construe a challenged statute, if it can, "if consistent with the will of Congress, so as to comport with constitutional limitations," (*United States Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973)), the Court has also said that, although it "will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." *Seals v. United States*, 367 U.S. 203, 211 (1961). It is submitted, as found by the Court below, that there is no basis to construe a warrant requirement into the OSHA Act.

To begin with, Congress imposed no such requirement, even in the face of a stinging attack by the Congressional minority on the absence of warrant protections. Thus, a minority report on an early version of the bill protested:<sup>40</sup>

Ill-advised inspections provisions. H.R. 16785 authorizes searches of employer establishments for safety and health violations. Such searches may be conducted without a warrant and individuals who are not government officials may participate in the search. Evidence so obtained may be used in a criminal prosecution. Anyone who gives advance notice of, or who forceably resists such a search may be subject to criminal prosecution.

These provisions, in our view, indicate the unfortunate direction of this bill. The major approach is penal. It is more concerned with catching employers at some wrong doing than with obtaining safe and healthful working conditions.

The fourth amendment of our constitution was designed to safeguard the privacy and security of individuals against arbitrary invasions and searches by government officials. (*Norman See v. City of Seattle*, 387 US 541; *Camera v. Municipal Court* 387 US 523). The amendment is a concrete expression of a right that is basic to a free society. (*Wolf v. Colorado*, 338 US 25, 27). As a general rule, a search of private property must be decided by "a judicial official, not by a police or government enforcement agent." (*Johnson v. US* 333 US 10, 14).

Yet, instead of limiting this extraordinary power to government agents acting in carefully restricted circumstances the bill provides for participation in the search by non-government personnel. Even the

<sup>40</sup> H.R. Rep. No. 91-1291, 91st Cong., 2nd Sess. 55 (1970).

use of advance notice of intention to search, relied on by some jurists to justify non-warrant inspections in some limited circumstances, is prohibited by the bill. (*See v. Seattle* 387 US 541, 549). Advance notice of inspection should obviously be permitted not only to satisfy constitutional consideration but also to permit appropriate company officials to be present in order to immediately correct any violation found.

Lastly, it should be noted that the only way an employer may test the constitutional validity of the search provided for by this legislation is by risking a conviction for forceably resisting the effort to inspect.

The failure to include a warrant provision, in face of this criticism, strongly suggests that none was intended and indeed, was consciously rejected.<sup>40</sup> Moreover, as the Senate Report on the bill makes clear, the purpose of Section 8(a) was to enable inspection rights, not upon presentment of a warrant, but merely upon presentment of the inspector's credentials. S. Rep. No. 91-1282, 91st Cong., 2nd Sess., 11 (1970) stated:

In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter

<sup>40</sup> A survey of the complete legislative history of the Act reveals that the only substantive change in the inspection section was the addition of the words "without delay" at the insistence of the House, in order to prevent evasion of an inspection. Leg. Hist., at 1076-1077, 1189. See also, *Id.* at 11, 46, 92, 151, 171, 249, 546, 608, 639, 663, 735, 782, 836, 852, 869, 949, 1097, 1163.

at reasonable times the premises of any place of employment covered by this act, to inspect and investigate within reasonable limits all pertinent conditions, and also to privately question owners, operators, agents or employees.

And while the *Gibson's Court*<sup>41</sup> construed a constitutional warrant interpretation from the remarks of one of the bill's authors, Congressman Steiger, that the Secretary "would have to act in accordance with applicable constitutional protection",<sup>42</sup> that passage only serves to corroborate the view that no warrant was intended. For that "assurance" arose in the context of Congressman Steiger's explaining that the power of the inspector to enter was complete once the inspector tendered his credentials and entered at a reasonable time—precisely the type of "broad statutory safeguards" which were found constitutionally insufficient by this Court in *Camera v. Municipal Court, supra*, 387 U.S. at 532-33. Finally removing any doubt as to the "applicable constitutional protections" contemplated by Congressman Steiger was his speech on the Floor of the House on January 6, 1977, denouncing the subject *Barlow's* decision, and asserting "Warrantless civil inspections are both absolutely essential to this Act's enforcement and a longstanding federal practice . . .".<sup>43</sup>

That Congress did not intend for a warrant provision is further confirmed by the scheme and legislative

<sup>41</sup> See also *Brennan v. Buckeye Industries*, 374 F. Supp. 1350, 1354 n. 6 (S.D. Ga., 1974); *Accu-namics, Inc.* 1 O.S.H. (BNA) 1751, 1754 (1974), enforced, 515 F.2d 828, 833-34 (C.A. 5, 1975).

<sup>42</sup> 116 Cong. Rec. 38, 709 (1970).

<sup>43</sup> Occupational Safety and Health Reporter 1043 (BNA) (1977).

history of Section 8(f)(1) of the Act," which requires the Secretary to conduct a "special inspection" upon the complaint of an employee or employee representative, if the Secretary first determines that "there are reasonable grounds to believe" that the complained of danger or violation exists at the employer's workplace. In the Congressional debates over this provision, serious concern was expressed over the potential for harassment of employers by disgruntled employees or employees' representatives, who may seek to trigger repeated inspections of a particular employer by invoking the Section 8(f)(1) complaint procedure." Notwithstanding this expressed concern, and although it

<sup>44</sup> Section 8(f)(1) of the Act, 29 U.S.C. 657(f)(1), provides:

Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representatives of the employees in writing of such determination. (emphasis added).

<sup>45</sup> See, e.g., Leg. Hist. 347-48, 398-99 (comments of Senator Saxbe); *Id.* at 1219 (comments of Representative Steiger).

was contemplated that the Secretary would perform what amounts to a probable cause determination with respect to employee complaints,<sup>46</sup> Congress chose not to require a warrant for employee-triggered inspections. Given this history, the conclusion that Congress affirmatively eschewed a warrant requirement for OSHA searches is inescapable.

In sum, the Act contemplated that presentment of the roving inspector's credentials and limiting entry to reasonable times would satisfy the Fourth Amendment; the requirement of a search warrant issued by a detached magistrate to protect the public was rejected. This fatal defect is the subject of reformation by Congress, not the courts.

**IV. EVEN IF THE ACT IS JUDICIALLY CONSTRUED TO REQUIRE A SEARCH WARRANT, THE PURPOSES OF THE ACT WILL NOT THEREBY BE FRUSTRATED.**

As demonstrated in Part III, *supra*, Congress intended OSHA inspections to be conducted without a search warrant. For that reason, Section 8(a) of the Act should be declared unconstitutional. However, in the event the Court elects to construe the Act so as to comply with the Fourth Amendment by requiring search warrants, that approach will not frustrate administration of the Act.

As is the case under the current mode of administering the statute, most businessmen, like the home dwell-

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<sup>46</sup> The Secretary's "probable cause" determination is, of course, constitutionally infirm. *United States v. United States District Court*, *supra*, 407 U.S. at 316.

ers in *Camera* (387 U.S. at 539), allow OSHA inspectors into their premises. Thus, with respect to the vast majority of inspections, a warrant requirement will present no obstruction to OSHA. Cf., *Frank v. Maryland*, *supra*, 359 U.S. at 384 (Douglas, J., dissenting). In those remaining cases where consent is denied and the inspection is triggered by an employee complaint<sup>47</sup> or a reported accident,<sup>48</sup> the inspector will assumedly have sufficient cause to justify a routine issuance of a search warrant. Similarly, the Secretary may canvass employer accident and illness records required by Sec. 8(a)(2) to determine whether such incidence reflects probable cause to believe the Act is being violated. Indeed, as one court stated<sup>49</sup> in declaring OSHA constitutionally subject to a warrant requirement based upon an individual showing of probable cause:

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<sup>47</sup> In 1975 there were 7399 inspections initiated by employee complaints. 5 Occ. Saf. & Health Rptr. (BNA) 1304. Interestingly, when an employee files a complaint, OSHA must first satisfy itself, under Sec. 8(f)(1), that "there are reasonable grounds to believe that such violation or danger exists" before inspecting the premises. It is observed, perhaps ironically, that there is therefore greater employer exposure to an inspection where there is no complaint, than where there is. In any event, even the procedure on employee complaints fails to disarm the constitutional infirmity because the determination to search is made by the law enforcement officer, rather than a neutral magistrate, and no warrant issues for the protection of the citizen. Cf. *United States v. U.S.D.C.*, *supra*, 407 U.S. at 317.

<sup>48</sup> Reports of work related deaths must be immediately made to OSHA pursuant to 29 C.F.R. § 1904.8. See also Section 8(e)(2) of the Act, 29 U.S.C. 657(c)(2).

<sup>49</sup> *Marshall v. Shellcast Corp., et al.*, — F. Supp. —, 5 OSHC (BNA) 1689 (Nos. 77-P-0995-E; 77-P-0996-S; N.D. Ala., July 26, 1977).

It may be noted that had the OSHA agents requested information such as contained on OSHA Forms 100, 101 and 102 and had been denied that information by the respective defendants, or if the OSHA agents had, from inspecting such reports or Report Form 103 or any other special reports that might have been given, come to the conclusion that these defendants or others bore a particular reason for inspection, or if there had been complaints by employees or others as to hazardous conditions or possible violations, or if prior inspections had indicated serious problems of potentially serious problems, certainly by changing some of the facts, this order and this decision could likewise have been changed or be changed.

None of this requires advance notice to the employer by OSHA.

But even if advance notice were given, "there is no compelling urgency to inspect at a particular time on a particular day," (*Camera v. Municipal Court, supra.*, 387 U.S. at 539), which a warrant requirement might impede. For, under OSHA's current administration of the statute, approximately seventy-five percent of OSHA inspection are "general schedule" random visits.<sup>50</sup> As in *G.M. Leasing Corp. v. United States, supra*, 97 S.Ct. at 631, "The statute simply does not focus on situations involving a need for rapid action." Indeed, as noted above, given the staggering breadth of the OSHA safety regulations in those cases where consent to the inspection is not forthcoming and the inspector has to seek a warrant, the likelihood of the employer being able to ascertain and correct a violation, or conceal it, would be remote, unlike the situation attend-

<sup>50</sup> 5 Occ. Saf. & Health Rptr. (BNA) p. 1304.

ant to contraband drugs, liquor, or weapons. And even if a potential violation were corrected while the inspector was in the process of obtaining a warrant, the remedial purposes of the Act would be furthered, not hindered. For it is the purpose of the Act to remedy unsafe conditions, not to punish the offender. Moreover, successful concealment would be unlikely since the Act authorizes the inspector to privately question employees during his inspection of the premises.

In sum, where the government elects not to tip its hand that an inspection is imminent, there is ample basis for establishing probable cause to obtain a warrant without further notice.

Moreover, the warrant requirement presents no more of an intrusion upon the advance notice concern than OSHA's current practice of seeking an "inspection warrant" when consent to inspect is refused.<sup>51</sup> In the "inspection warrant" situation, OSHA tips its hand that a search is imminent by going to district court after consent to enter is refused. No greater notice would be involved if a search warrant were required instead. Thus, there is no greater exposure to advance notice under a search warrant procedure than under the present "inspection warrant" procedure espoused as adequate by the Government. The difference between the two modes of procedure is that one requires a demonstration of probable cause while the other does not. The choice, then, reduces itself not to the makeweight of "advance notice" but rather whether insistence upon the constitutional safeguard of probable cause is

<sup>51</sup> See *Brennan v. Gibson's Products Inc. of Plano, supra*; *Dunlop v. Hertzler Enterprises, Inc., supra*; *Brennan v. Buckeye Industries, Inc., supra*.

to be excused for the sake of expediency to search premises where there is absolutely no reason to believe that a violation of law has occurred. That there may be serious imagined problems in a workplace when there is no basis for knowing so, is no reason for dispensing with constitutional safeguards. As this Court stated in *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 274-275:

It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

To be sure, a warrant requirement may put a crimp in OSHA's inspection attempts where there is neither consent nor probable cause. However, the short answer to that concern is that "there is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied." *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 575 (Brennan, J., dissenting).

Finally, as *Camera* teaches, the probable cause standard is not inflexible; it varies with the circumstances and may be more relaxed in a safety context compared to a criminal one. (387 U.S. at 538). It is suggested that probable cause to justify a warrant might exist on the basis of an employee complaint, a reported accident, inspection of the employer's accident and illness

logs, or his history of violations. In this fashion, the vitality of the right to inspect where consent is denied may be preserved consistent with the protections of the Constitution.

### CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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SEP 30 1977

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1977

\_\_\_\_\_  
No. 76-1143  
\_\_\_\_\_

RAY MARSHALL,  
SECRETARY OF LABOR, *et al.*,

*Appellants,*

v.

BARLOW'S INC.

*Respondent.*

\_\_\_\_\_  
ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF IDAHO  
\_\_\_\_\_

BRIEF FOR THE NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS AS AMICUS CURIAE  
\_\_\_\_\_

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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

---

BRIEF FOR THE NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS  
AS AMICUS CURIAE

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This brief *amicus curiae* is filed in support of the position of the appellee by the National Federation of Independent Business with the consent of the parties, as provided by Rule 42 of the Rules of this Court.

## INTEREST OF THE AMICUS CURIAE

Amicus National Federation of Independent Business (NFIB) is a voluntary nonprofit membership association whose purpose is to promote and advocate the interests of small business. Its 525,000 members include over 200,000 retailers as well as a variety of manufacturers, wholesalers and service businesses. It has by far the largest individual membership of any business organization in the United States and is the leading representative for small and independent businesses in each of the fifty states.

The membership of NFIB has a direct interest in the Occupational Safety and Health Administration (OSHA) enforcement procedures as framed by the issued in *Barlow's Inc. v. Usery*, 424 F. Supp. 437 (D. Idaho 1977). NFIB businesses are small; only five percent have more than 40 employees. Many members operate their businesses out of their homes. Nearly all members are subject to the Occupational Safety and Health Act of 1970, including the attendant warrantless searches which are in issue in this action.

OSHA has calculated that businesses having 25 or fewer employees constitute only 30 percent of all people employed, but constitute 90 percent of the five million businesses over which OSHA and correspondent state agencies exercise regulatory authority.<sup>1</sup> It is clear that small businesses in particular bear a disproportionate burden of the OSHA regulatory procedures. And to the extent that such procedures are constitutionally impermissible, small businesses suffer a serious incursion on their rights.

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<sup>1</sup>An extensive discussion of the impact of OSHA on small business is found in a policy paper prepared by the OSHA Policy Analysis Staff. See *Occupational Safety and Health Administration's Impact on Small Business*, United States Department of Labor (July, 1976).

Thus it is absolutely relevant that NFIB, a small business spokesman, participate in the judicial debate concerning OSHA warrantless searches. Much Federal regulation has been characterized by broadly stated goals followed by tortured and often irrational implementation of the regulatory scheme. Whatever the lofty intentions of the OSHA legislation, it is clear that its implementation in the form of warrantless on-site inspections is a tremendous burden on small businesses. Since such a procedure is neither necessary to the proper pursuit of OSHA legislative goals, nor, more importantly, founded on sound constitutional grounds, the National Federation of Independent Business is strongly interested in the affirmation of the decision on appeal.

## SUMMARY OF ARGUMENT

The Occupational Safety and Health Act of 1970 (OSHA) and regulations issued under its authority have authorized and established a procedure for federal inspection of workplaces under which inspections of a workplace can be mandated without the inspector obtaining a search warrant. This law, as it is enforced without the requirement of a warrant for a challenged on-site inspection, violates the Fourth Amendment proscription against warrantless searches and is therefore unconstitutional as applied.

The searches in issue are administrative inspections of commercial establishments. This Court has specifically applied the Fourth Amendment warrant requirement to administrative searches by federal and local officials. Business and commercial establishments are clearly entitled to Fourth Amendment protections. The Court has required warrants to be obtained in several situations involving enforcement of laws protecting the public health and welfare. The Court has found warrants not to be required in governmental inspections related to highly regulated commodities, such as firearms and alcohol, where the owner of such a business has effectively chosen to submit his

property to the attendant regulations. OSHA inspections are subject to Fourth Amendment protections as they apply to a broad segment of businesses which neither share a prior history of extensive governmental regulation nor have consented to deal in a particular commodity or activity which is highly supervised.

Considerations of public policy support the ultimate goal of OSHA to reduce worker safety and health problems but cannot justify the warrantless procedure here in issue. The goals of OSHA will not be undermined by affirming the unconstitutionality of such warrantless searches. Warrantless on-site inspections are only one of several methods OSHA utilizes to discover and remedy workplace dangers. Furthermore, the on-site inspection procedure is questionably effective in its performance in detecting serious violations, and in its ability to affect the serious environmental hazards or the idiosyncratic behavioral problems which ultimately have the most impact on workplace safety and health. Finally an affirmation that the OSHA inspections must be based on a valid search warrant would no doubt practically affect only a small number of the thousands of inspections OSHA performs each year. There is no reason to suspect that employers would demand a warrant from each and every inspector. OSHA will not be deterred from its responsibility to improve the safety of the workplace by being required to pass constitutional muster with its random inspection procedure.

## ARGUMENT

### I. JUSTIFICATIONS FOR WARRANTLESS SEARCHES PURSUANT TO THE OCCUPATIONAL SAFETY AND HEALTH ACT, 29 USC 657(a), ARE INSUFFICIENT TO OVERRIDE THE GUARANTEE OF FOURTH AMENDMENT RIGHTS.

### A. THIS COURT HAS HELD ADMINISTRATIVE SEARCHES OF COMMERCIAL ENTERPRISES SUBJECT TO THE WARRANT REQUIREMENTS OF THE FOURTH AMENDMENT.

This case involves the constitutional validity of searches of business establishments pursuant to the Occupational Safety and Health Act, 29 USC 651 et seq. (1970). The Act authorizes agents of the Department of Labor:

(1) to enter without delay and at reasonable times any factory, plant establishment, construction site, or other area, workplace or environment where work is performed by an employee of or employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee." 29 U.S.C. 657(a).

This section has been construed by the Department of Labor to authorize an exception to the Fourth Amendment protection against warrantless intrusions and searches.

This Court in the landmark decision of *Camara v. Municipal Court*, 387 U.S. 523 (1967), upheld the right to insist that San Francisco Housing Authority inspectors secure a warrant prior to inspection. The California statute bore a striking resemblance to the Occupational Safety and Health Act (hereinafter referred to as OSHA) in that it required that credentials be presented and that inspections be at reasonable times and done in a reasonable manner. The Court reasoned that protection from

abuse in criminal searches should be extended to cover administrative searches as well *Id.* at 528. The Court did not go so far as to require probable cause to believe violations existed but did require a warrant for administrative searches of private property.

While the *Camara* case dealt with the inspection of private housing under a municipal housing code, the companion case of *See v. City of Seattle*, 387 U.S. 541 (1967), considered the constitutionality of routine, periodic fire inspections of commercial establishments. The principal impact of *See* was to establish that business establishments *per se* are no more susceptible to unconstitutional searches than are private dwellings. In considering whether an exception to the Fourth Amendment warrant requirement was justified, the Court used a reasonableness standard in equating the inspections to an administrative subpoena of corporate records. The Court noted that when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires "that the subpoena be sufficiently limited in scope, relative in purpose, and specific in directives so that compliance will not be unreasonably burdensome" (387 U.S. at 544). The Court found those same conditions equally applicable to the inspection in *See* and found that the warrant procedure was the appropriate mechanism to ensure that proper standards were applied in the search. The Court reserved decision on the problems of "licensing programs" which require inspections, stating that they were to be resolved on a case by case basis under the general Fourth Amendment standard of reasonableness.

#### B. THIS COURT HAS CAREFULLY DELINEATED SEVERAL EXCEPTIONS TO THIS RULE ON PUBLIC POLICY GROUNDS.

The first creation of an exception to the Fourth Amendment rule came in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). The Court in *Colonnade* encountered a

warrantless inspection of the business premises of a liquor licensee by agents of the Internal Revenue Service pursuant to statute. In that instance the Court again upheld the idea that a warrant is generally necessary as a prerequisite to inspection. However, it distinguished *Colonnade* from *Camara* in upholding the Service's right to inspect without a warrant because the Court found several differences between *Colonnade* and *Camara* and the case at bar.

First, Congress had exercised broad powers in regulating the liquor business so as to counter various abuses. The use of this power in such a narrow commercial area was justified by the obvious public interest in controlling liquor distribution. Second, because liquor had long been subject to strict regulation, because of restraints in the statute on types of inspection and the great possibility for illegal activity, the search was not found to be unreasonable. *Id.* at 75-77. Third, acceptance of a liquor license was considered a formal consent to the strict regulation and, thereby, the warrantless inspection. *Id.* at 77.

Relying upon the *Colonnade* language, the Court in *United States v. Biswell*, 406 U.S. 311 (1972), expanded the administrative search exception to the Fourth Amendment. The subject of *Biswell* was regulation of firearms traffic, rather than the liquor industry considered by *Colonnade*, *supra*. The Gun Control Act of 1968 authorized official entry during business hours into "the premises (including places of storage) of any firearms or ammunition... dealer... for the purpose of inspecting or examining (1) any records or documents required to be kept... and (2) any firearms or ammunition kept or stored by such... dealer... at such premises." 18 U.S.C. 923(g). Under this provision, a Federal Treasury agent inspected a licensee's books and storeroom, resulting in the conviction of the licensee for unlawful possession of two sawed-off rifles. Although the agents had received the consent of the owner to inspect the premises, the Court refused to premise its decision upon that basis stating that:

"In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute" (406 U.S. at 315).

The Court noted that Federal regulation of interstate traffic of firearms was not as deeply rooted in history as governmental control of the liquor industry. Despite this, it found such warrantless searches to be justifiable as "of central importance to Federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders." *Id.* While establishing the requirement that inspection procedures be specifically provided in the regulatory statute, the Court further specified that the inspection would only be legitimate under the Fourth Amendment if it constituted reasonable official conduct. In contrasting the inspection of firearms with that considered in the *See* case, the Court stated:

"Here, if inspection is to be effective and serve as a creditable deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspections; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protection afforded by a warrant would be negligible." *Id.* at 316.

One further justification given by the Court in the *Biswell* case was that the inspections posed only limited threats to the dealers' justifiable expectations to privacy. The Court reasoned that a dealer who chose to engage in this "pervasively regulated business and to accept a federal license" does so with the knowledge that his records and equipment would then become subject to effective inspection. Thus, unlike the *Camara* and *See* cases, the dealer would not be left to conjecture regarding the legitimacy of the inspector or the limits of the inspection.

The Court made it clear in the *Almeida - Sanchez v. United States*, 413 U.S. 266 (1973), decision that the *Colonnade* and *Biswell* cases were narrowly carved exceptions to the general rule in *Camara* and *See*. The *Almeida-Sanchez* Court emphasized that the *Colonnade* and *Biswell* factual circumstances justified a particular exception to normal expectations of business privacy.

"A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessmen in a regulated industry in effect consents to the restrictions placed upon him." 413 U.S. at 271.

Recently, the Court in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), held the warrantless entry into a petitioner's office by IRS agents to be in violation of the Fourth Amendment. The Court found that, unlike the *Biswell* and *Colonnade* cases, "... the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities. Rather, the intrusion is claimed to be justified on the ground the petitioner's assets were seizable to satisfy tax assessment" (*Id.* at 354). The Court rejected the contention that the public interest in the collection of taxes justified a warrantless search in noting that both *Biswell, supra*, and *Colonnade, supra*, involved voluntary participation in a highly regulated activity. Also noted was the lack of any specific statutory provision authorizing warrantless inspections, which the Court refused to read into the statute. The *G.M. Leasing Corp.* opinion might suggest a slight liberalization of the Fourth Amendment exception. The decision seems to imply that a warrantless provision can be premised not solely upon licensing or regulation, but also upon the *nature of the particular business itself*. At the very least the *G.M. Leasing Corp.* decision strongly indicates that the Fourth Amendment

exceptions carved out in *Biswell* and *Colonnade* retain their validity, so that a decision from the Supreme Court finding warrants necessary to the OSHA inspections will not reverse those earlier decisions.

C. THE CASE AT BAR DOES NOT COME WITHIN THE NARROW EXCEPTIONS OUTLINED IN *COLONNADE* AND *BISWELL*.

Several recent cases have attempted to hold OSHA inspections alongside the *Colonnade* and *Biswell* exceptions in order to determine whether OSHA will come within their scope.

The District Court for the Southern District of Georgia found the policy behind OSHA and its relationship to warrantless inspections to be sufficiently interdependent to carve out another exception in *Brennan v. Buckeye Industries Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974). The Court held that the limited invasion was necessary for the efficient operation of the OSHA statute and was, therefore, a reasonable intrusion.

The *Buckeye* Court not only followed the reasoning of *Colonnade* and *Biswell* despite radically different circumstances but also expanded the narrow exceptions to include commercial enterprises not closely regulated and not dealing in products of a highly abused nature (such as guns or liquor). *Buckeye* was not a case of an implied consent through a special license.

On the other hand, a Texas decision, *Brennan v. Gibson's Products Inc.*, 407 F.Supp. 154 (E.D. Tex. 1976), held just the opposite under very similar factual circumstances.

Judge Gee, writing for the three judge Court, found that the authority given the Secretary of Labor under the Act did not contemplate warrantless searches. Although recognizing that

Congress could under the Commerce Clause legislate limited invasions of privacy, the Court did not feel the nexus between OSHA's avowed purpose and the warrantless search was close enough to allow abrogation of a fundamental principle of civil liberty. In upholding the statute, Judge Gee interpreted the Congressional mandate as intending that OSHA obtain either valid consent or a warrant before allowing inspection.

In its decision, the Court below noted several causes for adopting reasoning similar to that of the *Gibson* court. First, the Court did not feel that it could force the OSHA search to fit in the *Colonnade* and *Biswell* exceptions:

"We simply cannot overlook the fact that in *Colonnade* and *Biswell* the court dealt with an 'industry long subject to close supervision and inspection' (*Colonnade*, 397 U.S. at 77), and a 'pervasively regulated business' (*Biswell*, 406 U.S. at 316). We believe that both of those cases fit into the *Camara* categorization of 'certain carefully defined classes of cases.' We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce. 29 U.S.C. 651(a)(3). As such, it applies to a wide variety of over 6,000,000 work places and does not focus on one particular type of business or industry. It cannot be questioned that its broad spectrum of business can be distinguished from the heavily-regulated liquor and firearm industries encountered in *Colonnade* and *Biswell*." *Barlow's Inc. v. Usery*, 424 F. Supp. 437 at 440.

Secondly, it would fly in the face of *Almeida* and more recently, *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), which expressly reaffirmed the holdings in *Camara* and *See. Id.* at 441.

We believe the Court below was entirely correct in noting that:

"There is one common thread among these cases that requires the result we reach here. In *Camara*, *See* and *Western Alfalfa*, *supra*, each was involved with statutory and regulatory schemes aimed at promoting and protecting public health and safety. The warrantless inspections authorized under OSHA likewise seek to promote public health and safety and therefore must be controlled by *Camara* and *See*." *Barlow's Inc. v. U.Serv.*, 424 F. Supp. 437 at 441.

The OSHA statute is not narrowly drawn and covers nearly every product and workplace imaginable, not specifically delineated and closely regulated businesses. Barlow's is neither federally licensed nor dealing in pervasively regulated commodities. An attempt to force the instant situation into the narrow exceptions outlined by *Biswell* and *Colonnade* would dilute the meaning of *Camara* and *See* to insignificance and severely reduce the personal protection from government intrusion afforded by the Fourth Amendment.

## II. IMPLEMENTATION OF THE POLICY GOALS UNDERLYING OSHA DOES NOT REQUIRE CREATION OF ANOTHER EXCEPTION TO THE FOURTH AMENDMENT PROTECTIONS.

The practice of warrantless on-site OSHA inspections not only treads upon employers' reasonable expectations of constitutional protection of their privacy, but also is of questionable efficacy in achieving the improvement of safety and health in the workplace. The goal of safeguarding the working environment is an important national interest. The Congress and the Occupational Safety and Health Administration have estab-

lished an extensive set of laws, regulations and administrative procedures directed toward that end. But as laudable as is this policy goal, it should not be used to justify a governmental intrusion into a private workplace which has heretofore been relatively independent and free of such burdensome regulation.

The regulation of the workplace is itself not an issue in this matter. To the extent the appellant recites the importance of the Occupational Safety and Health Act, the government is advancing a bootstrap argument for permitting the warrantless inspections. There is simply no existing program of governmental searches or inspections of private property which is analogous in scope or impact to the OSHA on-site inspection program. Warrantless administrative searches have been constitutionally permitted in those narrow areas relative to specific commodities, such as alcohol and firearms. The businessman who enters such fields has done so with the full knowledge that his business premises are open to the appropriate inspection scheme. It is a condition of that business. But the OSHA inspection applies across the gamut of business workplaces, from retail and service to manufacturing. It cannot be argued that the small store owner or businessman has simply by his attempt to earn a living in his own business thereby reduced the expectation that his business premises would be free from governmental intrusion, an intrusion considered by OSHA immune from the usual requirements of constitutionality.

The Occupational Safety and Health Administration relies on a variety of procedures to ascertain whether its standards and regulations are being followed and whether significant safety and health problems exist in a given workplace. The random on-site inspection procedure in issue in this matter is only one means OSHA has utilized to achieve this end. It is considered by the Occupational Safety and Health Administration the lowest

priority inspection procedure in terms of the agency's responding to possible safety violations.<sup>2</sup>

In the incident giving rise to this action the respondent, before refusing the OSHA inspector admittance to his business premises, ensured that the inspector was not seeking entrance as a result of a catastrophe, employee complaints or any alleged poor safety record. Appendix for Appellant at 25. There was no reason for Mr. Barlow to expect an OSHA inspection either because of any special factors calling into question the safety of his operation or because he was involved in a so called "target industry."<sup>3</sup> It is the random inspection procedure to which the respondent objects, because there is no demonstrable reason

<sup>2</sup>See, for instance, a colloquy between the House Appropriations Subcommittee Chairman and the former head of OSHA.

Mr. FLOOD.

What are your inspection priorities? How do you establish those?

Mr. STENDER. We start with the imminent danger, the catastrophes, we investigate those; we have the target industries, we have the complaints from employees concerning safety. Then we follow with the general inspection, random inspections as we call them.

*Department of Labor Related Agencies: Hearings before a Subcommittee of the House Appropriations Comm., 94th Cong., 1st Session (statement of John H. Stender) at 635.*

See also the OSHA staff report on small business. "OSHA performs inspections based on the following order of priorities: imminent danger, fatalities and catastrophic accidents, employee complaints, National Emphasis Programs, and general schedule."

*OSHA Impact on Small Business, supra, at 18.*

<sup>3</sup>A "target industry" is one in which OSHA attempts to perform a particular number of inspections based on a characteristically high incidence of injury rate in that industry. For the year 1972-1973, OSHA had established the following target industries: roofing, meat products,

available to justify OSHA's invasion of his business privacy. Absent any objective evidence available to OSHA, such as a catastrophe report or employee complaint, it cannot be said that a warrantless inspection is justified.

That the present decision on appeal will not frustrate the Congressional intent of OSHA is further demonstrated by a study that the agency itself did of the impact of its inspection policies on small business. The vast majority of OSHA inspections are of "small" businesses (less than 25 employees). Yet OSHA admits that small business is primarily involved in relatively safe industry sectors, as compared with the nationwide industrial safety record. Those industries having the highest incidence rates are primarily populated by larger concerns.<sup>4</sup>

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lumber and wood products, misc. transportation equipment and water transportation service. See *Department of Labor Appropriations Hearings, supra* at 668. Barlow's Inc. was not part of a target industry. Thus for Barlow, it cannot be argued that the governmental interest is weightier because that industry is characteristically more dangerous. Nor can the argument be made that having been explicitly named by OSHA as a special target for random inspections, the expectation of privacy of the air conditioner industry is any less than that of non-target industries.

<sup>4</sup>"Businesses having 25 or fewer employees account for only 30 percent of all people employed. Of the almost 5 million business establishments over which federal and state OSHA programs exercise regulatory authority, 4.5 million or 90 percent have 25 or fewer employees. About 19.4 million employees work in these small businesses, while the larger businesses employ about 41.1 million workers.

Almost 80 percent of the small businesses are in the industry sectors having the lowest injury and illness incidence rates, while 60 percent of the large businesses are in those sectors (see Table 1). Only 15 percent of the small businesses are in the sectors having the highest rates, compared to 32 percent of the large businesses."

*OSHA Impact on Small Business, supra, at 18.*

These study figures suggest that the random inspection program has in fact not been focused on those workplaces which pose the greatest threat to employee health and safety. To insist that the inspections be backed up on demand by constitutionally required warrant procedures is justified by the expectation not only of the small business owner that his premises enjoy normal privacy protections but of the taxpayer that the federal agency responsible for workplace safety would discharge that responsibility in a manner that is administratively efficient and legally sound. The random warrantless inspection program is neither.<sup>5</sup>

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<sup>5</sup>There is considerable uncertainty as to what the record of workplace health has been since the advent of OSHA and to what to attribute any improvement in workplace safety. A recent study by the Library of Congress notes:

"Both the BLS and NSC indicate that part of the decrease in the injury and fatality rates between 1974 and 1975 can be attributed to a decrease in the general employment rate. Both organizations report that the last people hired are generally the greatest safety risks and, since they are less experienced than workers with more seniority, they frequently contribute to higher injury and fatality rates. Similarly, the last hired are frequently the first fired or laid off in times of employment cutbacks. Therefore, when the same group of people is removed from the employment picture, the injury and fatality rates are expected to decline somewhat, as a result.

The BLS also indicates that part of this decision in fatality and injury rates may be attributed to the disproportionate drop in manufacturing and contract construction employment from 1974 to 1975. Both of these injuries have relatively higher rates of injuries and fatalities than the rest of the private economy."

*Benefits and Costs of the Occupational Safety and Health Act: A Review of the Available Evidence*; The Library of Congress, January 26, 1977.

In fact there is a growing body of evidence which suggests that the basic procedure of random inspections is not able to detect the major causes of injuries and health hazards in the workplace. Studies done in Idaho, California and Wisconsin, at the request of OSHA, all came to the conclusion that the inspection system now employed by OSHA is, by its very nature, unable to detect the most frequent causes of injury and illness.<sup>6</sup> For example, data was examined on industry wide bases and in Wisconsin showed that the Wisconsin inspection system, which is generally more stringent than even OSHA's, could only control 25% of the accidents in the sample. The remaining 75% were momentary (non-persistent) physical hazards and behavioral problems. The study did not even take into account long term environmental hazards which are unlikely to be detected through routine inspection by OSHA and its correspondent state agencies.

The appellant suggests that imposition of a warrant requirement will be specifically impractical as it will eliminate the possibility of a surprise search of premises before the employer is able to disguise violations. A perusal of OSHA workplace standards reveals lengthy and detailed regulations relating to nearly every imaginable aspect of the workplace. Doubtless a philosophical challenge for the bureaucrat seeking comprehensive regulations, OSHA standards have been a practical challenge for the employer who must first understand the rules

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<sup>6</sup>State of Wisconsin, Dept. of Industry, Labor and Human Relations; *Inspection Effectiveness Report*, September 28, 1971.

State of Idaho, Industrial Commission, Statistics Division; *Preliminary Report for 1973 Fiscal Year Survey of Injury Due to Occupational Accidents or Illnesses*.

California Department of Industrial Relations, Dir. Management Analysis; *Development of Inspection Value Index*, June 30, 1973.

and then implement them.<sup>7</sup> The specter of the employer suddenly disguising his noncompliant shop after refusing entrance to the warrantless OSHA inspector is not plausible. OSHA regulations are so intricate and cover such broad areas that discovery of violations, particularly serious violations, would not likely be avoided by a few days notice and some cosmetic action on the part of the employer. Furthermore, if the notice results in the correction of the problem before the inspection arrives, the goal of the agency is completely served. The imposition of a warrant requirement will only frustrate those inspectors to whom levying a penalty is more important than the underlying goal of improving the workplace.

Finally, the government only suggests that the warrant requirement would create enforcement problems. As pointed out in appellant's brief there is now a procedure within OSHA for an inspector to obtain compulsory process if he is refused admittance by an employer. Brief for Appellant at 8. There is no indication that OSHA inspectors must resort to this procedure with any degree of regularity. There is no showing that hundreds or thousands of inspections have been delayed because of this procedure. This hypothetical argument has no basis. This Court has the discretion to find a warrant required in every inspection where voluntary consent of the employer is not given. It is unlikely that requiring a challenged inspector to obtain a search warrant will severely deter the OSHA inspector forces from pursuing their appointed task.

This Court in *Camara v. Municipal Court*, 387 U.S. 523 (1967), rejected the argument that the efficacy of the San Francisco Code required warrantless inspections stating:

<sup>7</sup>It has been the experience of many member firms of the amicus that not only are they unable to keep up with the complicated flow of regulations from the Occupational Safety and Health Administration, but the OSHA inspectors themselves are often unsure of the interpretation and application of the regulations.

"In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement." *Id.* at 533.

Similarly, if OSHA is to sustain its claim to an exception to the Fourth Amendment, it must show that the Inspection program is accomplishing its governmental purpose and that purpose would be frustrated without those inspections now in question. It is the contention of the National Federation of Independent Business (NFIB) that the OSHA random inspection program is not and cannot efficiently accomplish its avowed goals and that pursuit of workplace safety would not be hampered by a warrant requirement.

### CONCLUSION

The random on-site Occupational Safety and Health Act inspection procedure is of questionable administrative efficacy and unquestionably devoid of proper constitutional protections. The national interest in encouraging workplace safety is not dependent upon the warrantless inspection procedure. The three judge district court correctly decided the procedure was unconstitutional. That decision should be affirmed by this Court.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

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**No. 76-1143**  
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RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
v. *Appellants,*

BARLOW'S INC.

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**On Appeal from the United States District Court  
for the District of Idaho**  
\_\_\_\_\_

**BRIEF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
AMICUS CURIAE**  
\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
*Appellants,*

v.

BARLOW'S INC.

On Appeal from the United States District Court  
for the District of Idaho

BRIEF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE <sup>1</sup>

The Chamber of Commerce of the United States of America is the largest association of business and professional organizations in the United States and is a principal spokesman for the American business community. The Chamber of Commerce has a direct membership of more than 3700 state and local chambers of com-

<sup>1</sup> This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

merce and professional and trade associations, and over 65,000 business firms.

In order to represent its members' views on questions of importance to their vital interests and to provide such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in numerous cases of constitutional importance.

The threshold constitutional issue presented in this case, whether warrantless inspections conducted under the Occupational Safety and Health Act of 1970 violate the Fourth Amendment, is of significant interest to members of the Chamber both in their role as employers, and as individuals. It is important to employers because reversal of the lower court's decision would signal a broad repeal of the Fourth Amendment protections traditionally applicable to businesses. It would mean that any company, regardless of its size or the nature of its activities, would be subject to warrantless administrative inspections in furtherance of any governmental purpose, without any reason to believe that the subject of the inspection is within the scope of official scrutiny.

It is important to members of the Chamber as individuals because such a substantial diminution in basic constitutional protections in one sector ultimately affects everyone. History and experience have borne this out time after time. It is precisely for this reason that this Court has counseled resolute loyalty to constitutional safeguards when balanced against the pressure of governmental interests that encroach on basic Fourth Amendment rights. This is particularly significant where, as in this case under OSHA, the valid public interest in protecting employees may be achieved within the framework of a warrant procedure without frustrating the laudable goals of the Act.

For these reasons, the Chamber respectfully submits this brief in support of Appellee's contention that the decision below should be affirmed.

## SUMMARY OF THE ARGUMENT

### I

The authority to conduct administrative searches and otherwise administer regulatory schemes is predicated on a congressional determination that to protect the public interest, particular commodities or endeavors should be controlled. Nevertheless, the mere existence of a valid regulatory scheme of itself cannot derogate constitutional safeguards against unreasonable searches and seizures. To be considered reasonable, that authority must be evidenced by a search warrant, signed by a neutral magistrate who has determined that there exists a level of probable cause sufficient to justify the inspection. Neither Congress nor public opinion are free to suspend constitutional protections by either statutory enactment or popular referendums. See, *Reitman v. Mulkey*, 387 U.S. 369 (1967).

The general rule, that random warrantless administrative inspections of business establishments are unreasonable unless supported by a search warrant, clearly applies to the facts of this case. *Camara v. Municipal Court*, 387 U.S. 523; See *v. City of Seattle*, 387 U.S. 541. All of the concerns expressed by the Court in *Camara* and *See* are present here. The unreviewed discretion of administrative officials to conduct searches, the potential for abuse, and the failure of statutory safeguards to provide meaningful protection dictate that the rule be applied to inspections under OSHA.

None of the exceptions to the warrant requirement of the Fourth Amendment are justified by the circumstances here presented. When the entire statutory scheme is considered as a whole, it is clear that to require a warrant

for such random, routine inspections will not frustrate the purposes of the Act. Nor does the statute fall within the extremely narrow exception enunciated by the Court in *United States v. Biswell*, 406 U.S. 311, as is made clear by subsequent cases. *Almeida-Sanchez v. United States*, 413 U.S. 266, *G.M. Leasing Corp. v. United States*, 50 L. Ed. 2d 530; Cf. *Air Pollution Variance Board v. Western Alfalfa Corp.*, 418 U.S. 861.

## II

The Secretary's own contemporaneous interpretation of the Act supports the decision below that the Fourth Amendment requires a warrant be obtained where consent to inspect is denied. That this interpretation was reaffirmed by the Secretary long after the decisions on which he now relies is most persuasive, if not controlling. See, e.g. *Skidmore v. Swift and Co.* 323 U.S. 134, *General Electric Co. v. Gilbert*, 97 S. Ct. 401.

## III

The pertinent legislative history supports the decision below that Congress specifically authorized warrantless administrative inspections in contravention of the Fourth Amendment. Accordingly, the lower court was correct in refusing to judicially re-draft the statute to cure its constitutional infirmity.

## ARGUMENT

### I. A RANDOM ADMINISTRATIVE INSPECTION OF COMMERCIAL PREMISES CONDUCTED PURSUANT TO THE PROVISIONS OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, WITHOUT A SEARCH WARRANT ISSUED UPON PROBABLE CAUSE, CONTRAVENES THE REQUIREMENT OF THE FOURTH AMENDMENT.

#### A. The Inspection Provisions of the Act Are Not Exempt From the Warrant Requirement of the Fourth Amendment.

In enacting the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et. seq.*, hereinafter OSHA or the Act) Congress made the finding "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. 651. Thus, Congress established as its purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . ." 29 U.S.C. 651(b). To effectuate this broad purpose, the Act provides inspection and enforcement procedures which allow administrative inspectors, upon presenting appropriate credentials, to enter the premises of all workplaces covered by the Act<sup>2</sup> for the purpose of inspecting and investigating working conditions. Section 657(a) of the Act provides:

(a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate creden-

<sup>2</sup> As one Senator has observed OSHA applies to "every business affecting Commerce in the entire United States, ranging anywhere from a big steel company to a shoeshine shop." 116 Cong. Rec. 36,509 (1970) (Remarks of Senator Dominick).

tials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

The Act imposes upon the employer the duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm," and to comply with the occupational safety and health standards promulgated under the Act. 29 U.S.C. § 654(a)(1), (2). If an inspector "believes" a violation of this section exists, he is required to issue a citation. 29 U.S.C. § 658(a). Violations of the Act may result in criminal as well as civil liability. 29 U.S.C. § 666(a)-(e). In addition, one who interferes with or impedes a government officer, including an OSHA inspector, while engaged in the performance of his duties is subject to a fine and/or imprisonment. 18 U.S.C. §§ 111, 1114.

It is with this background that the Act must be tested against the fundamental rights guaranteed by the Fourth Amendment. Significantly, in addition to the lower court, the vast majority of other federal courts that have balanced the public interest sought to be advanced by the Act against the fundamental rights guaranteed by the

Fourth Amendment, have concluded that constitutional safeguards against significant intrusions into the rightful expectations of privacy must prevail. *Marshall v. Shellcast Corporation, et. al.* No. 77-P-0995-E (N.D. Ala., July 26, 1977); *Marshall v. Great Lakes Dredge and Dock Co.*, No. Misc. 785 (S.D. Calif., July 11, 1977); *Usery v. Centrif-Air Machine Company, Inc.*, 424 F. Supp. 959 (N.D. Ga., 1977), appeal pending, C.A. 5, No. 77-1511; *Dunlop v. Hertzler Enterprises, Inc.*, 418 F. Supp. 627 (D. N.M., 1976) (three judge court), appeal pending, C.A. 10, No. 76-2020; *Usery v. Rupp Forge Co.*, No. C-76-395 (N.D. Ohio, April, 1976), appeal pending, C.A. 6, No. 76-1960; *Brennan v. Gibson Products, Inc., of Plano*, 407 F. Supp. 154 (E.D. Tex., 1976) (three judge court), appeal pending, C.A. 5, No. 76-1526.<sup>3</sup>

Similarly, six state courts have held that state inspection provisions analagous to those of the Act are either unconstitutional or require enforcement within the framework of a warrant procedure. See, *State ex rel. New Mexico Environmental Improvement Agency v. Albuquerque Publishing Co.*, No. 9-76-04397, (Second District, January 20, 1977); *Yocom v. Burnette Tractor Co., Inc.*, No. CA-366-MR (Ky. Ct. of App., May 27, 1977); *Epstein v. Fitzwater*, No. 6838EQ (Cir. Ct. Garrett County, Md., September 2, 1976); *Oregon v. Keith R. Foster, dba Keith Mfg. Co.*, Civ. No. 5493 (Cir. Ct. Jefferson County, Ore., November 1, 1976); *Alaska v. Alaska Truss and Millwork*, No. 2903 (Alaska Supreme Ct., June 2, 1977); *R. Lamar Baird, et. al. v. State of Utah, et. al.*, Civ. No. 237878 (Third Judicial District, January 20, 1977).

The common rationale on which these decisions are based is the recognition of the long standing "governing

<sup>3</sup> *Contra; Brennan v. Buckeye Industries*, 374 F. Supp. 1350 (S.D. Ga. 1974); *Dunlop v. Able Contractors, Inc.*, No. 25-57-BLG (D. Mont., Dec. 15, 1975), appeal pending, C.A. 9, No. 76-1615.

principle . . . [which] has consistently been followed [that], except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been evidenced by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *G.M. Leasing Corp. v. United States*, — U.S. —, 50 L. Ed. 2d 530, 543 (1977).

In the *Camara* case, the defendant had been convicted for violating a municipal ordinance by refusing to permit building inspectors to inspect his residence without a warrant, and in the *See* case, the defendant had been convicted for violating a municipal ordinance by refusing to permit a fire department representative to inspect his commercial warehouse without a warrant. Overturning each of these convictions, the Court concluded, *inter alia*, that administrative searches under fire, health, or building inspection programs were significant intrusions upon the interests protected by the Fourth Amendment; that the Fourth Amendment forbids warrantless inspections of commercial structures as well as private premises, and that a citizen had a constitutional right to insist that a search warrant be obtained prior to the inspection of his premises or business establishment. The Court summarized its holding in *Camara* as follows (387 U.S. at 534):

We hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guaranteed to the individual, and that reasons . . . for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections. (Emphasis added).

In *See v. City of Seattle*, *supra*, the Court stated that the only question presented to it was whether the principles enunciated in *Camara* are equally applicable to administrative inspections of commercial premises which are not used as private residences. Holding that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled . . . within the framework of a warrant procedure" (387 U.S. at 545), the Court explained:

. . . [w]e see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. *The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violations of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.* *Id.* at 543 (Emphasis added).

That OSHA "embodie[s] precisely the evil the Court saw in *Camara* when it insisted" that a warrant be obtained is clear (*Almeida-Sanchez*, *supra* 413 U.S. at 270), despite the Secretary's assertions to the contrary. Thus, the fact that the decision to inspect is not left to the discretion of the enforcement officer in the field, but is made by some other administrative official based on policy guidelines established by the Secretary is irrelevant. (Brief of Appellant at 7, 37). As appropriately stated by this Court in *United States v. United States District Court*, 407 U.S. 297, 317:

The Fourth Amendment does not contemplate the executive officers of Government as neutral and disin-

interested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. (See, also, *Almeida-Sanchez*, *supra*, 413 U.S. at 280 (Powell, J. concurring.))

In conjunction with the above the Secretary also asserts that since routine inspections are to be conducted on a representative basis, and the Act clearly defines the scope and authority of the inspector, there are no questions of disputed facts in the search situation here in issue for a magistrate to resolve (Brief of Appellant 36-37). However, it is clear that the compliance officer *has* unlimited discretion in deciding which areas of a particular factory are to be searched. If a question arises concerning the applicability of the Act to such an area the owner in question has no way of determining whether the officer's insistence that such area be inspected is within lawful limits. This is precisely the question which a magistrate could, and should, be called upon to answer. Cf. *G.M. Leasing Corp. v. United States*, *supra*, 50 L.Ed. 2d at 546.

Finally, it is argued that the provisions of the Act authorizing inspections are "hedged with safeguards" and that to require a warrant would provide no meaningful protection for an employer's privacy interest in addition to those already provided by the Act and regulations. See, *Camara v. Municipal Court*, *supra*, 387 U.S. at 531. These safeguards require an inspector to present "appropriate credentials to the owner, operator or agent in charge" (29 U.S.C. 657(a))<sup>1</sup> and direct that an employer be given the opportunity to accompany the inspector during his inspection of the workplace (29

<sup>1</sup> The San Francisco Code also required that the inspector display proper credentials and inspect only at reasonable times. *Camara v. Municipal Court*, *supra*, 387 U.S. at 531, n. 9.

U.S.C. 657(e)). In addition, agency regulations require the inspector to explain the nature, purpose and scope of the proposed inspection. 29 C.F.R. § 1903.7(a). However, it is significant to this issue to note that these so called "safeguards" have been held to be "procedural" rather than substantive, and failure by the inspector to abide by them has been deemed insufficient grounds for according the employer the protection afforded by the Fourth Amendment. *Marshall v. Western Waterproofing Co. Inc.*, — F. 2d —, No. 76-1703 (8th Cir., Aug. 23, 1977); *Accu-Namics, Inc. v. Occupational Safety and Health Review Commission*, 515 F. 2d 828 (5th Cir. 1975) *cert. denied*, 425 U.S. 903; *Chicago Bridge and Iron Co. v. Dunlop*, 535 F. 2d 371 (8th Cir., 1976); *Hartwell Excavation v. Dunlop*, 537 F. 2d 1071 (9th Cir., 1976). Accordingly, if it is held that the Fourth Amendment does not apply to OSHA inspections then an employer's right to privacy may be violated with impunity.

That the Court would not countenance such a result is evident from its discussion in *Camara* where, in responding to arguments almost identical to those put forth by the Secretary, it concluded (387 U.S. at 532-533):

In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry the occupant has no way of knowing whether enforcement . . . requires inspection of his premises, no way of knowing the lawful limits of the inspector's powers to search, and no way of knowing whether the inspector himself is acting under proper authorization. *These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area.* (Emphasis added).

\* \* \*

The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. *This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.* We simply cannot say that the protections provided by a warrant procedure are not needed in this context; *broad statutory safeguards are no substitute for individualized review . . .* (Emphasis added).

Thus, all the concerns expressed by the Court in *Camara* and *See* apply with equal force to OSHA inspections, and the requirement of a warrant must be imposed if the rule enunciated in these cases is to have any continuing validity. Such a requirement, when read in light of the Court's discussion pertaining to the reasonable standard of probable cause applicable to such warrants, "merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy." (*Camara, supra* at 539).

Based on the foregoing, it is not surprising to find that the courts, in dealing with a number of federal statutes other than OSHA, have consistently upheld the rule that an authorized, non-consensual administrative inspection of commercial premises may only be accomplished upon presentation of a warrant based upon an appropriate standard of probable cause. *United States v. Thriftmart, Inc.*, 429 F. 2d 1006 (9th Cir., 1970); cert. den. 400 U.S. 926, reh. den. 400 U.S. 1002 (1970); *United States v. J. B. Kramer Grocery Company*, 418 F. 2d 987 (8th Cir., 1969); *United States v. Hammond Milling Co.*, 413 F. 2d 608, (5th Cir. 1969); cert. den. 396 U.S. 1002; *United States v. Anile*, 352 F. Supp. 14 (N.D.

W.Va. 1973); *Klutz v. Beam*, 374 F. Supp. 1129 (W.D. N.C., 1973).<sup>6</sup>

That this Court continues to "adhere to *Camara* and *See*" as the governing rule in warrantless inspections of business premises is beyond dispute. *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 864 (1974); Cf., *G.M. Leasing Corp. supra* at 543. Indeed, the context of this specific reaffirmance of *Camara* and *See* is noteworthy. The situation involved an inspection under a pollution control statute, legislation similar to OSHA in that its highly regulated standards apply across the board to numerous industries. The Court held that since the violative condition was visible to the general public, an exception to the Fourth Amendment analagous to the "open fields" doctrine was applicable to the facts of that case. However, in emphasizing the continued validity of *Camara* and *See*, this Court clearly indicated its concern over the intrusion into privacy that would have resulted if the inspection had been made inside the plant in areas from which the public was excluded, and the violation was not open to public view, as is the case with the vast majority of OSHA inspections.

In point of fact, OSHA is precisely analagous to the regulatory schemes involved in *Camara* and *See*. Both dealt with health and safety inspections, just as OSHA does; both involved random area-wide searches not focusing on individual persons or particular industries, equivalent to the broad sweep of OSHA; and the fire and health codes in *Camara* and *See* had as their principle objective securing compliance rather than prosecution, as does OSHA.<sup>7</sup> Moreover, the inspection schemes involved in

<sup>6</sup> See, also, *U.S. v. Hart*, 359 F. Supp. 835 (D. Del. 1973); *U.S. v. Kendall Co.* 324 F. Supp. 628 (D. Mass. 1971); *U.S. v. Stanack Sales Co.* 387 F. 2d 849 (3rd Cir., 1968).

<sup>7</sup> One floor leader of the bill noted that OSHA "emphasizes the preventative rather than the punitive aspect of job safety regula-

those cases, as with OSHA, are enforceable within the framework of a warrant procedure, based upon a reasonable standard of probable cause "designed to guarantee that a decision to search private property is justified by a reasonable governmental interest," without frustrating the "valid public interest" sought to be enforced. *Camara*, *supra*, 387 U.S. at 539. Accordingly, the same result reached by the Court in *Camara* and *See* must obtain here.

Nor can this compelling principle be overridden by alleging that simply because a person has chosen to engage in a business, and employs people in furtherance of that endeavor, he or she has voluntarily given up all reasonable expectations of privacy in that business. Indeed, such a strained reading of *Camara* and *See* would have the perverse effect of rendering the principle enunciated by the Court in those cases as the exception rather than the rule. It would not be an exaggeration to say, applying this rationale, that all warrantless searches are reasonable subject to a few jealously guarded exceptions. More important are the implications inherent in such reasoning. We would assume, carrying this approach to its logical conclusion, that a homeowner who employs a person in domestic service would then be subject to inspections under OSHA<sup>7</sup> or under an analagous state statute. Desks or safes to which a secretary routinely has access would likewise no longer be protected. Other examples are possible but the point to be made is that the legitimate public interest in protecting employees, while certainly pertinent in justifying the authority given the Secretary to conduct OSHA inspections, cannot be con-

tion" 116 Cong. Rec. 42,203 (1970) (remarks of Congressman Daniels).

<sup>7</sup> Congress long ago found that "the employment of persons in domestic service in households affects commerce." 29 U.S.C. 202(a), Fair Labor Standards Act of 1938.

trolling in determining whether such inspections may proceed without a warrant. See, *e.g.*, *Camara*, *supra*, at 533. Accordingly, unless some other justification is present, there is no basis for exempting OSHA inspections from the Fourth Amendment.

**B. The Imposition of a Warrant Requirement Will Not Frustrate the Purposes of the Act.**

It is asserted by the Secretary that an exception to the warrant requirement is compelled because the burden of obtaining a warrant would frustrate the governmental purpose behind the search. The rationale underlying this assertion is founded on the assumption that employers will receive the equivalent of advance notice of inspection, circumscribed by the Act (29 U.S.C. 651(b)(10)), thereby affording them sufficient time to temporarily conceal hazardous working conditions (Brief of Appellant at 38-39, 45). However, "the statute authorizes [inspection] regardless of any risk of concealment [and] simply does not focus on situations involving a need for rapid action." *G.M. Leasing Corp. supra*, 50 L. Ed. 2d at 546. Thus, in order to justify an exception on this ground, it must be demonstrated that to require a warrant in every type of search conducted pursuant to Section 657(a) of the Act, either in advance of inspection or only after consent is refused, would frustrate the aim of the Act. See, *Camara*, *supra*, 387 U.S. at 533-34; *See*, *supra*; *Almeida-Sanchez*, *supra*, 413 U.S. at 282-283 (Powell, J. concurring). The Secretary's own guidelines and the Act's overall enforcement scheme mitigate against such a finding.

Pursuant to the policies of the Act, the Secretary has divided OSHA inspections into four general categories of decreasing urgency and priority.<sup>8</sup> The highest priority is

<sup>8</sup> U.S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, 1 CCH ESHG ¶4327.2 (1976).

given to investigations of imminent dangers. Second come fatality/catastrophe investigations. Third come inspections initiated by employee complaints and last in priority are random, general schedule investigations, called Regional Programmed Inspections. This classification clearly demonstrates that surprise warrantless inspections are not vital to OSHA's overall enforcement scheme. In the case of imminent danger or catastrophe investigations, we assume that no warrant would be needed under the exception "traditionally upheld in emergency situations." (*Camara, supra*, 387 U.S. at 539). In the case of fatality or employee complaint inspections, probable cause could easily be established, and a warrant obtained, by submitting to the magistrate the fatality report prepared by the employer (29 C.F.R. § 1904.8) or the employee complaint, so entry need never be delayed.<sup>9</sup>

Thus, when properly focused, the Secretary's argument seeks "to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy made in furtherance of [the Act]" (*G.M. Leasing Corp. supra*, 50 L. Ed. 2d at 547), based solely on the assumption that surprise routine inspections, where "there is no compelling need to inspect at a particular time or on a particular day," (*Camara, supra*, 387 U.S. at 539), are crucial to the Act's purposes. Implicit in this argument is the assumption that employers are sufficiently familiar with the voluminous standards promulgated by the Secretary to take advantage of the relatively small delay involved in obtaining a warrant to inspect.<sup>10</sup> Such an assumption is unfounded.

<sup>9</sup> The magistrate's review of warrant requests would serve to insure that the procedural safeguards of the Act will be adhered to, and would otherwise guarantee that the inspection is not arbitrary, harassing or otherwise unlawfully motivated. The Act itself provides no such guarantees. These considerations may be reviewed without reviewing the policy behind inspection.

<sup>10</sup> Meeting the probable cause standard enunciated by the Court in *Camara* would not impose a burden on the Secretary. 387 U.S. at

In addition to being required to keep his workplace free from "recognized hazards," 29 U.S.C. 654(a)(1), a term not subject to precise definition,<sup>11</sup> an employer must also comply with approximately 4,400 health and safety standards, with 2,100 applying to all industries and the remainder to construction and maritime industries. 29 U.S.C. 654(a)(2); 29 C.F.R. § 1910 *et seq.* These standards range from those that have been characterized as vague,<sup>12</sup> to those for which a layman must find it difficult to assess his compliance.<sup>13</sup> It therefore seems safe to say that these standards, for the most part, apply to "conditions [which] may not be apparent to the inexperienced [employer]," (*Camara, supra*, 387 U.S. at 537) and which would be "relatively difficult to conceal or correct in a short period of time." *United States v. Biswell, supra*, 406, U.S. at 315.

Even assuming, *arguendo*, that an employer were able to identify and correct all possible violations while a warrant is obtained, then the principle purpose of the Act, abatement of hazardous conditions, will have been achieved. However, it is argued that such abatement

537-538. See, e.g. *Marshall v. Cerromalloy American Corp.*, Civil Action No. 77-C-291 (E.D. Wisc., July 12, 1977); *Usery v. Northwest Airlines, Inc.*, No. 76-C-2177 (E.D. N.Y. July 10, 1977).

<sup>11</sup> See, e.g. *American Smelting and Refining Corp. v. OSHRC*; 501 F. 2d 504 (8th Cir. 1974); *National Realty and Construction Company v. OSHRC*, 489 F. 2d 1287 (D.C. Cir. 1973).

<sup>12</sup> 29 C.F.R. § 1910.132(a) which requires the use of personal protective equipment "by reason of hazards of processes or environment" has been called "not a model of perfect precision." *Ryder Truck Lines v. Brennan*, 497 F. 2d 230 (5th Cir. 1974).

<sup>13</sup> Of the 140-odd standards pertaining to portable wood ladders, the following illustrates the point, 29 C.F.R. § 1910.25(b)(3)(ii):

The general slope of grain and that in areas of local deviations of grain shall not be steeper than 1 in 15 in rungs and cleats. For all ladders cross grain not steeper than 1 in 12 are permitted in lieu of 1 in 15, provided the size is increased to afford at least 15 percent greater calculated strength for ladders built to minimum dimensions. Local deviations of grain associated with otherwise permissible irregularities are permitted.

may only be temporary and will allow an employer to escape liability. But this argument ignores the other provisions of the Act that are designed to deal with just such a possibility. Indeed, Section 658(a) requires that a citation for violation be issued "[i]f upon inspection or investigation the Secretary believes" that a violation of the Act has occurred. (Emphasis added). Such belief, therefore, obviously need not depend on actual observation of the violation. In fact, the Secretary's interpretation of this provision specifically provides that:

[W]here the [inspector's] inspection or investigation reveals a violative condition to which the employer's employees were actually or potentially exposed in the past . . . a citation should be issued.<sup>14</sup> (Emphasis added).

Information pertaining to previous violations may be obtained during the course of interviews with employees. 29 U.S.C. 657(a)(2). Indeed, the Secretary completely ignores the role of employees in the enforcement of the Act. Section 659(b)(1) specifically encourages employees in the effort to reduce hazardous conditions, and Section 660(c) provides them with complete protection against any retaliation for securing their rights under the Act. Accordingly, it is not surprising to find that the Secretary's guidelines suggest that an employee's statement be taken "[w]hen advance notice has been given and there is reason to believe a violation would have existed at the time of inspection if advance notice had not been given."<sup>15</sup>

Once a citation has been issued the purposes of the Act are fulfilled. If an employer fails to contest,<sup>16</sup> it is

<sup>14</sup> *Field Operations Manual*, *supra*, 1 CCH ESHG ¶ 4380.4.

<sup>15</sup> *Field Operations Manual*, *supra*, at ¶ 4330.4.

<sup>16</sup> See, 29 U.S.C. 659(a). If not contested within fifteen days, the citation becomes an unreviewable final order.

unlikely that he or she will allow the condition to deteriorate and risk a penalty of ten thousand dollars for a repeated violation. 29 U.S.C. 666(a). Thus, the advance notice afforded by a warrant does not signal a reprieve to those few employers who may seek to avoid their responsibilities under the Act.

When viewed within the overall statutory framework, the Secretary's argument of burden based on concealment and avoidance does not rise to the level of a burden that would frustrate the purposes of the Act, but rather to the level of inconvenience based on lack of budget and manpower (Brief of Appellant at 40-41). However, "inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement." *Almeida-Sanchez*, *supra*, 413 U.S. at 283 (Powell, J. concurring). While the problem is not to be ignored, the remedy should be sought through legislative means and not in the context of seeking a broad exemption from constitutional safeguards.

#### ***C. OSHA Does Not Fall Within the Carefully Limited Exception to the Fourth Amendment.***

It is clear beyond cavil that "warrantless searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment subject only to a few jealously limited and carefully guarded exceptions." *Youghiogeny and Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 50 (S.D. Ohio 1973). In establishing this overriding principle, the Court in *See* expressly reserved comment on inspections conducted pursuant to a licensing program in a regulated industry (387 U.S. at 546). The constitutional validity of such a warrantless administrative inspection was raised in *United States v. Biswell*, 406 U.S. 311 (1972). In an extremely narrow decision, the Court held valid a warrantless search of a licensed gun dealer's locked pawnshop storeroom pursuant to Sec-

tion 923(g) of the Gun Control Act of 1968, 18 U.S.C. § 921 *et. seq.*, because of the "pervasively regulated" nature of the gun sales industry. In applying the rationale of its earlier decision in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)<sup>17</sup> the Court noted that the "inspection system aimed at federally licensed dealers in firearms . . . is not as deeply rooted in history as is governmental control of the liquor industry" but determined that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the states in regulating firearms traffic within their borders" (406 U.S. at 315). In further defining the parameters of its holding, the Court, in language equally applicable to OSHA, noted:

[T]he mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short period of time. *Periodic inspections sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the inspection system there at issue.* (Emphasis added) *Id.* at 316.

Thus, upon considering the easy concealability and portability of firearms and ammunition, and the fact that the items subject to inspection were required by law to be maintained on the premises, the Court concluded:

*In this context*, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope and frequency is to be preserved, the protection afforded by a warrant would be negligible. It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of pri-

<sup>17</sup> The Court held that a statutorily authorized administrative search of a business possessing a liquor license did not offend the Fourth Amendment because it involved an "industry long subject to close supervision and inspection . . ." 397 U.S. at 77.

vacy. *When a dealer chooses to engage in this pervasively regulated business and to accept a federal license*, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." *Id.*, at 316 (Emphasis added)

The exception thus contemplated by the Court is quite clear and extremely limited; in order for a warrantless search to be considered reasonable it may be authorized only if the business establishment is engaged in a "pervasively regulated business" where "urgent federal interests" are at stake, *and* only if surprise inspections are deemed vital to the regulatory scheme and pose only a limited threat to justifiable expectations of privacy. *U.S. v. Biswell, supra*, at 317.

In applying this test to OSHA it is clear that no such exception is justified. The scope of OSHA is so broad, covering as it does every business affecting commerce (29 U.S.C. § 652(5)), that it cannot seriously be contended that OSHA encompasses only businesses historically subject to pervasive regulation and inspection which have implicitly consented to reasonable searches in furtherance of the public interest. Nor can this burden be overcome by reliance upon the Walsh-Healy Act of 1936, 41 U.S.C. § 35 *et seq.*, or upon pre-existing national consensus standards (Brief of Appellant at 43). The Walsh-Healy Act applied only to those employers who voluntarily undertook to be federal contractors and suppliers and thereby knowingly consented to inspections. As for the argument that national consensus standards were widely distributed and familiar to all businesses, the following comment by former Chairman (now Commissioner) Bar-

nako of the Occupational Safety and Health Review Commission is appropriate:

"[T]he standards were drafted as recommendations for optimal workplace safety and health without any idea that they would or should become law. And they were not drafted by industry consensus but frequently by representatives of selected industries for those industries. That is, some were vertical and some were horizontal. All of industry was not represented on all committees, nor did other industries object to the standards as published because such standards were of no concern to them."<sup>18</sup>

Moreover, as has already been demonstrated, there is simply no support for the argument that the requirement of a warrant for routine, random inspections is inimical to the Act's regulatory scheme. This is particularly valid to OSHA where, unlike *Biswell*, there is no basis for believing that the object of the inspection, hazardous conditions, is to be found on the premises.

Thus, the cases relied upon by the Secretary to support a Fourth Amendment exception to OSHA are inapposite, for they are limited to carefully defined contexts and purposes.<sup>19</sup> Accordingly, reliance upon "the reasoning of *Biswell* and *Colonnade* [which] cases involved voluntary participation in a highly regulated activity . . . is [in]sufficient to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy

<sup>18</sup> Barnako, *Enforcing Job Safety: A Managerial View*, Monthly Labor Review, March, 1975 at 37.

<sup>19</sup> *Terraciano v. Montanye*, 493 F. 2d 682 (2d Cir. 1974) (statutorily authorized inspection of licensed pharmacist's drug records); *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 49-50 (S.D. Ohio 1973) (inspection of coal mine conducted pursuant to statute); *United States v. Business Builders*, 354 F. Supp. 141 (N.D. Okl. 1973) (warehouse containing federally regulated food products inspected pursuant to federal statute); *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1377 (D. Del. 1972) (statutorily authorized inspection of bakery business).

made in furtherance of [OSHA]." *G.M. Leasing Corp.*, *supra*, 50 L. Ed. at 547.

Indeed, any confusion over Congressional authority to nullify the Fourth Amendment by simply authorizing warrantless inspections in any area of legitimate federal concern was finally laid to rest by the Court in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The Court declined the government's invitation to extend its ruling in *Biswell* to cover random area searches of automobiles for the illegal importation of aliens, noting that such a search "embodies precisely the evil the Court saw in *Camara* when it insisted" that a warrant be obtained. 413 U.S. at 270. The Court reiterated its limitation of *Biswell* stating that ". . . businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . ." 413 U.S. at 271. The Court continued:

Moreover, in *Colonnade* and *Biswell*, the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns. In the present case, by contrast, there was no such assurance that the individual searched was within the proper scope of official scrutiny . . .

The Court recognized that controlling unlawful entry of aliens was an important problem of national concern but refused to expand further the infringement of basic rights by concluding: "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 413 U.S. at 274.

As the preceding discussion has demonstrated, there is simply no basis in law or fact that would justify placing the inspection provisions of OSHA outside the protection

afforded by the Fourth Amendment, and the vast majority of those courts that have specifically faced this issue have so held.<sup>20</sup> The decision of the court in *Brennan v. Gibson Products, supra*, 407 F. Supp. 154, on which the other decisions rely, is most instructive. After conducting an analysis similar to the foregoing, the court noted: "OSHA's sweep is broad and Congress' findings supporting it are slender. Made subject to its warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all 'environments' these employees work." 407 F. Supp. at 161. The court then dealt with the argument that OSHA fits within the exceptions enunciated in *U.S. v. Biswell, supra*:

By contrast, the discount house which is the target here is not licensed, it has no history of close regulation, and the OSHA provisions appearing facially to authorize the search are in no sense limited in their application to such businesses. Nor is there any reason whatever, let alone a certainty, to believe that the thing sought to be controlled—hazardous working conditions—exists in the area to be searched. A finding by Congress that such conditions exist in most enterprises subject to OSHA might throw a different light on the subject, but there was none and we doubt there could have been.

. . . . .

This warrantless search would not comply with Fourth Amendment standards and cannot be countenanced. (407 F. Supp. at 162)

That similar results have been reached by so many courts, and are concurred with by legal scholars,<sup>21</sup> leaves

<sup>20</sup> See cases cited, *supra* at 7.

<sup>21</sup> See, Note *Brennan v. Buckeye Industries, Inc.: The Constitutionality of an OSHA Warrantless Search*, 1975 Duke L. J. 406; Comment, *The Validity of Warrantless Searches Under The Occupational Safety and Health Act of 1970*, 44 Cinn. L.R. 105 (1975).

little doubt as to the applicability of the Fourth Amendment to OSHA. Accordingly, the lower court's decision to this effect should be affirmed.

## II. THE CONTEMPORANEOUS ADMINISTRATIVE REGULATIONS AND GUIDELINES OF THE SECRETARY OF LABOR SUPPORT THE DECISION BELOW THAT INSPECTIONS MAY ONLY BE ENFORCED THROUGH THE ISSUANCE OF A WARRANT.

Significantly overlooked in the briefs of Appellant and Amici on his behalf is the fact that the contemporaneous administrative pronouncements of the official charged with the responsibility of administering the Act specifically direct a compliance officer who is not permitted to make an inspection to leave the premises and begin the process of obtaining a warrant. To the extent that the Secretary of Labor now argues that these regulations and interpretations, which remained unchanged for four years from the date of enactment of OSHA, are erroneous or in conflict with more recent guidelines, his position is in direct contradiction to applicable decisions of this Court.

Within a year of the enactment of OSHA, the Department of Labor issued interpretive regulations which specifically set out the procedure to be followed by a compliance officer who is denied permission to inspect. Indeed, the pertinent regulation, 29 C.F.R. § 1903.4, is entitled "Objection to Inspections."<sup>22</sup>

The regulation provides:

Upon refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect

<sup>22</sup> Originally published at 36 Fed. Reg. 17850 (September 4, 1971).

... the ... Officer shall terminate the inspection ... The ... Officer shall immediately report the refusal ... to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary. (Emphasis added)

Shortly thereafter, in January of 1972, the Secretary of Labor issued a manual which was clearly intended as an official interpretation of the formal regulation, to be used by those to whom the Secretary had delegated the authority to inspect.<sup>23</sup> The relevant section, significantly entitled, "Refusal to Permit Inspection-Warrants" provides:

b. In cases where a CSHO encounters a refusal to permit entry, he should advise his Area Director, who will in turn refer the matter to the appropriate Regional Administrator and the Regional Solicitor with a request that an inspection warrant be obtained. (Emphasis added)

c. If an employer refuses to permit an inspection the CSHO ... will leave the premises and shall immediately report the refusal ... to the Area Director. The AD shall immediately consult with the Regional Administrator and the Regional Solicitor who shall promptly take appropriate action including compulsory process, if necessary.

\* \* \*

e. In cases where entry has been allowed and the employer interferes with or limits an important aspect of the investigation, the CSHO should decide whether to complete the inspection to the extent possible, or to discontinue the inspection and through the Area Director alert the Regional Administrator, and

<sup>23</sup> U.S. Department of Labor, Occupational Safety and Health Administration Compliance Operations Manual, Ch. V at V-6 to V-8 (January, 1972).

request the Regional Solicitor to seek an inspection warrant. For example, if the employer refuses to permit the walkaround or to permit the CSHO to examine records which are essential to the inspection, the inspection should be discontinued and an inspection warrant sought. ... (Emphasis added)

f. In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted. Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted. (Emphasis added)

\* \* \*

h. A warrant is a legal process issued by a United States Magistrate or a United States District Court Judge which will be directed to the CSHO authorizing the CSHO to conduct an inspection of premises which will be described in the warrant. ... All questions arising concerning reasonableness of any aspect of an inspection conducted pursuant to a warrant shall be referred to the Solicitor's office.

i. When the CSHO receives a warrant authorizing his inspection of designated premises, he will give the conduct of such an investigation first priority. ... Except in unusual circumstances which are cleared with the Regional Solicitor's office, there shall be no advance warning to the employer of the fact either that a warrant has been secured or that inspection will take place pursuant to the warrant. ...<sup>24</sup> (Emphasis added)

<sup>24</sup> The Court in *See v. City of Seattle*, supra, 387 U.S. at 545 n.6 recognized that the "nature of the regulation involved" might necessitate the obtaining of a warrant without notice. To the extent that this procedure is followed, it belies Appellant's argument that em-

Subsequently, in July, 1974, fully *two years after* this Court's decision in *Colonnade* and *Biswell*, the Secretary re-issued a revised manual but nonetheless adopted *verbatim* the policy of the earlier guidelines requiring that an "inspection warrant" be obtained where entry is refused.<sup>25</sup> It seems beyond dispute that these sections from the interpretive regulations demonstrate the Secretary's contemporaneous recognition that not only could OSHA function within the framework of a warrant procedure, but also that it was not exempt from the Fourth Amendment's requirements. Indeed, it was not until September of 1975, long after the Secretary had assumed the position of advocate in litigation then pending on this issue,<sup>26</sup> that the policy was officially changed by substituting the words "compulsory process" and "court order" in lieu of an "inspection warrant."<sup>27</sup>

The Secretary now attempts to have this Court give judicial sanction to this latter, conflicting interpretation of his authority to conduct inspections. However, this disregard for the Labor Department's contemporaneous official interpretation is totally inconsistent with the analysis which this Court has applied in similar circumstances. In *General Electric Co. v. Gilbert*, 50 L. Ed. 2d 343 (1976), this Court recently rejected an interpretive guideline of an agency which was inconsistent with its earlier position:

employers will receive advance notice of inspection sufficient to enable them to correct or conceal any violations. Indeed, the employer will not know when the inspector will return with a warrant, or even if one is being secured.

<sup>25</sup> U.S. Department of Labor, OSHA *Field Operations Manual*, Ch. V at V-4 to V-5 (July, 1974).

<sup>26</sup> See, e.g., *Brennan v. Gibson Products Inc.*, *supra*, 407 F. Supp. 154; *Dunlop v. Hertzler Enterprises Inc.*, *supra*, 418 F. Supp. 627.

<sup>27</sup> *Field Operations Manual*, Ch. V, at V-6, V-7 (September, 1975).

We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 858-859, n. 25 (1975); *Espinoza v. Farah Mfg. Co.*, *supra*, 414 U.S. at 92-96. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore*, *supra*. (*Id.* at 411).

The *Skidmore* standards are the ones which this Court should apply in weighing the Department of Labor's contemporaneous interpretations of its regulations against the "revised" policy now advocated in the Secretary's brief. Under those standards the weight to be given an administrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control."<sup>28</sup>

Applying this test to the Secretary's most recent guideline, to the extent it is now supported in his brief, it is clear that the interpretation "does not fare well under these standards. It is not a contemporaneous interpretation of [29 U.S.C. 657(a)], since it was first promulgated [four] years after the enactment of [OSHA]. More importantly, the [1975] guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute" and which was re-issued two years after the decision of this Court on which the agency now relies in support of a con-

<sup>28</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See also *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), where the Court rejected an argument of the Securities and Exchange Commission in an *amicus* brief which "flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release." *Id.* at 858 n. 25.

flicting position. *General Electric Co. v. Gilbert, supra*, 50 L. Ed. 2d at 358.

Clearly, the position which the Secretary assumed as advocate must not be allowed to override his contemporaneous interpretations of his authority to conduct inspections, which reflect a clear understanding of this Court's decisions defining the scope of Fourth Amendment protections. The Secretary as advocate should not be permitted to circumvent and ignore his own interpretation as administrator in this cavalier and unorthodox manner. As the district court aptly observed in *Brennan v. Gibson Products Inc., supra*:

Our independent interpretation of the statute is reinforced by the contemporaneous administrative construction of the statute, as evidenced by the requirement of an "inspection warrant" found in the Compliance Operations Manual and by the reference to "compulsory process" in 29 C.F.R. § 1903.4. Although the Administration has obviously changed its mind as to the necessity of a warrant, its initial and more contemporaneous interpretation is entitled to greater weight. 407 F. Supp. at 162. (Footnote omitted).

### III. THE LOWER COURTS HOLDING THAT CONGRESS UNCONSTITUTIONALLY PROVIDED FOR WARRANTLESS INSPECTIONS IN VIOLATION OF THE FOURTH AMENDMENT IS SUPPORTED BY THE LEGISLATIVE HISTORY OF THE ACT.

As demonstrated in the foregoing analysis, the decision of the lower court and of all the other federal courts are unassailable with respect to the applicability of the Fourth Amendment to OSHA inspections. The court below is alone, however, in declining to infer a congressional intent to require a warrant and holding Section 657(a) of the Act unconstitutional. We are mindful of the Court's

guidance that congressional intent to dispense with warrant requirements must be explicit and not merely implied, see, e.g. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77, and that the Court, without such explicit intent, will decline to give a statute a reading which "would call its constitutionality into serious question." *G.M. Leasing Corp. v. United States*, 50 L. Ed. 2d 530, 547. Nevertheless, we believe there is ample support for the conclusion reached below that no such requirement was ever intended.

In the minority views to the bill which was reported out of the House Committee on Education and Labor, which was eventually rejected but which contained provisions governing inspections virtually identical to those eventually enacted into law, the following reservations were expressed:

H.R. 16785 authorizes searches of employer establishments for safety and health violations. Such searches may be conducted *without a warrant* . . . Evidence so obtained may be used in a criminal prosecution . . . Lastly, it should be noted that the only way an employer may test the constitutional validity of the search provided for by this legislation is by risking a conviction for forcibly resisting the effort to inspect. (H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. at 55 (1970)).

That these fears were not unjustified is evidenced by the congressional debates on the purpose and scope of what is now Section 657(a) of the Act, wherein Representative Steiger, the author of the provision, engaged in a significant colloquy with one of his colleagues, Representative Galifianakis. The latter gentleman expressed his concern that "[u]nless the intent of these provisions is explained for the record, I fear that we may lose some of the effectiveness of this bill [H.R. 19200]." The following discussion ensued:

Question: Then I would ask the gentleman this: Is it legal, under the terms of H.R. 19200, for a low-ranking employee of a firm to leave a Federal inspector waiting at the entrance to a business simply by saying, "I am sorry, but I must locate the owner, operator, or agent in charge before you may present your credentials and enter." If that sort of evasion is legal under this bill, then we have lost the value of holding unannounced inspections.

Mr. Steiger: My answer is, that such an evasion is not legal under H.R. 19200. Under my bill, it would constitute interference with a Federal inspector subject to the criminal penalties of section 17(e). And I think the words "without delay," which appear in section 9(a)(1) of H.R. 19200, make it a stronger bill in this regard than the committee version.

\* \* \*

Question: And in the event that an "agent in charge" could not be located within a reasonable time, would the Federal inspector be able to gain entry by presenting his credentials to any other employee?

Mr. Steiger: I would say so. In general it is our intent in H.R. 19200 that the Federal inspector should gain entry to a business or workplace with an absolute minimum of delay. . . . The way we envision this provision as operating is that the inspector will present himself at the factory entrance and he will ask to see the agent in charge. The inspector will present his credentials to any employee who presents himself as the agent in charge. Now, if no person shows up stating that he is the agent in charge, then we do not intend that, under those circumstances, the inspector is going to wait an inordinate amount of time for such an agent to show up; and we certainly do not expect the inspector to give up and go back to his office. If none of the employees, purporting to be the agent in charge, shows up after a reasonable time, then we contemplate that the inspector, acting

for the Secretary, could regard any employee as the agent in charge for the purpose of presenting credentials under the act.

I would add that in carrying out inspection duties under this act, the Secretary, of course, would have to act in accordance with applicable constitutional protections.<sup>20</sup>

Whatever the phrase "applicable constitutional protections" refers to, it is clear, given the context of the remark, that it does not envision the applicability of the Fourth Amendment to OSHA inspections. Moreover, this is not a case where "[t]he [Appellants] offer no legislative history in support of their reading" of the statute. *G.M. Leasing Corp. v. United States*, *supra*, 50 L. Ed. 2d at 547. Indeed, the legislative history cited by the Secretary leads to the inescapable conclusion that Congress intended to provide for warrantless inspections. Brief of Appellant at 20-22, 38.

To aver that Congress does not intend to pass unconstitutional legislation is tautologous. The foregoing demonstrates that Congress plainly exceeded its power by specifically authorizing such searches, and that the lower court was correct in refusing to judicially re-draft the statute. However, should the Court determine that "under familiar principles of the constitutional adjudication, [its] duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment" (*Almeida-Sanchez supra*, 413 U.S. at 272), then the Chamber respectfully submits that this Court must conclude, as have the vast majority of other lower federal courts, that such inspections are constitutionally valid "only when made by a search warrant issued by a United States Magistrate or

<sup>20</sup> *Legislative History of the Occupational Safety and Health Act of 1970*, Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Session (1971) at 1075-1077.

other judicial officer . . . under probable cause standards appropriate to administrative searches . . ." *Gibson Products Inc.*, *supra*, 406 F. Supp. at 162. Accord: *Usery v. Centrif Air*, *supra*, 424 F. Supp. at 962; *Dunlop v. Hertzler Enterprises*, *supra*, 418 F. Supp. at 634; *Usery v. Rupp Forge*, *supra*.

### CONCLUSION

For the reasons set forth above, and those in the Appellee's brief, it is respectfully requested that the judgment of the lower court be affirmed.

Respectfully submitted,

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NO. 76-1143

Supreme Court, U. S.  
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MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

**RAY MARSHALL,**  
Secretary of Labor, et al.,  
*Appellants*

*v.*

**BARLOWS, INC.,**  
*Appellee*

**ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

**BRIEF AMICUS CURIAE ON BEHALF OF  
THE STATES OF IDAHO AND UTAH  
IN SUPPORT OF THE APPELLEE**

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**In the Supreme Court of the United States**

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**ON APPEAL FROM THE  
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**BRIEF AMICUS CURIAE ON BEHALF OF  
THE STATES OF IDAHO AND UTAH  
IN SUPPORT OF THE APPELLEE**

---

**QUESTIONS PRESENTED**

Whether the Fourth Amendment to the United States Constitution bars authorized representatives of the Secretary of Labor from conducting non-consensual inspections of any business affecting interstate commerce without probable cause and without a warrant pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C.A. §657(a).

### INTEREST OF AMICUS CURIAE

The Occupational Safety and Health Act of 1970, 29 U.S.C.A. §651, *et seq.* is a comprehensive attempt by Congress to reduce safety and health hazards for employees working in any business or enterprise which affects interstate commerce. Pursuant to 29 U.S.C.A. §667, States may assume responsibility for development and enforcement of standards designed to accomplish the laudable goals of the Act. However, no State plan may be approved pursuant to that statutory provision unless the plan, in effect, contains requirements for warrantless inspections such as those found in §657 of the Act. Due to these requirements for approval of State plans, States must elect either (1) to bow to the requirements for inspections in order to be allowed the right to assume responsibility for development and enforcement of safety and health standards or (2) to allow federal enforcement and development of standards, thereby giving up legitimate control and sanctioning the dangerous precedent and constitutional infirmities created in the Act through warrantless searches of business premises without probable cause. An affirmation of the holding of the three-judge federal panel below would allow any interested State to develop and enforce health and safety standards for industry within the parameters of constitutional guarantees.

### ARGUMENT

The Occupational Safety and Health Act of 1970, 29 U.S.C.A. §651, *et seq.* (hereinafter referred to as OSHA) is a legislative attempt to improve the working environment for millions of Americans. The valid far-reaching goals apply to all business activity having an affect on interstate commerce. Approximately five million businesses and sixty million employees fall within the reach of this extensive legisla-

tion. Robbins, *Truth and Rumor About OSHA*, 33 Fed. B.J. 149, 149 (1974).<sup>1</sup>

Since public health and safety is the *raison d'être* for OSHA, Congress wisely recognized the need for state involvement. Under 29 U.S.C.A. §§651(b) (11) and 667, States are encouraged to assume full responsibility for their health and safety laws, including development and enforcement of federal occupational standards. This authority is conditioned, however, on compliance with certain criteria. In short, a State may avoid to some extent federal preemption in the field of occupational hazards by adopting a plan which strictly adheres to the requirements listed in OSHA. A State failing to meet all of the listed requirements, or choosing not to do so, loses its authority as the prime mover in the field of occupational safety. For this reason, the requirements which must be met by each State are extremely significant because the State, in preparing an appropriate plan, must adopt as its own the requirements listed in 29 U.S.C.A. §667. The major §667 stumbling block for the States, resulting in a practice held unconstitutional on its face or as applied, is §667(c) (3), providing as follows:

"The secretary [of labor] shall approve the plan submitted by a state under subsection (b) of this section, or any modification thereof, if such plan in his judgment —  
(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in §657 of this Title, and includes a prohibition on advance notice of inspections ..."

Section 657, referred to in the quote, appears to allow inspections of private premises without probable cause or need for a warrant. The three-judge federal panel below held such a

---

<sup>1</sup>Statistics reflect, in fact, that over eighty percent (80%) of the nation's work force are covered by the Act. Shaffer, *Job Health and Safety*, 1976 Editorial Research Reports 953, 963.

practice unconstitutional. If such be the case, and we believe that it is, States, in order to assume control of occupational hazards within their borders, must subscribe to the unconstitutional inspection requirement contained in OSHA. States, therefore, are on the horns of a dilemma. They must either relinquish control of their occupational hazard programs to the federal government or adopt and enforce a warrantless inspection requirement violating the Fourth Amendment to the United States Constitution.

I.

**SECTION 8(a) OF OSHA, 29 U.S.C.A. §657 (a) REQUIRES INSPECTION OF PRIVATE PREMISES WITHOUT THE NEED FOR A WARRANT OR EVEN PROBABLE CAUSE AND VIOLATES, THEREFORE, THE GUARANTEES OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

The Fourth Amendment to the United States Constitution concisely states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Armed with the guarantees within the Fourth Amendment, citizens may rest secure (1) that they will not be subjected to unreasonable searches or seizures, and (2) that a warrant shall never issue except on probable cause, and (3) that, with certain narrow exceptions, no search or seizure shall take place without a warrant. Administrative inspections, which have grown considerably in recent years, fall within the purview of fourth amendment guarantees. Courts have long recognized the legitimate role played by administrative in-

spections in protection of the public interest. In balancing this interest with individual freedom against unreasonable searches and seizures, this Court has through several decisions interpreted the fourth amendment limits for administrative inspections. Section 8(a) of OSHA extends beyond the boundaries established by this Court.

OSHA administrative inspections are provided for as follows:

"In order to carry out the purposes of this chapter, the secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, work place or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee." 29 U.S.C.A. §657(a).

Congress liberally included the word "reasonable" throughout §657. However, this alone is far from enough. Numerous factors are involved in determining reasonableness of a search. Reasonableness triggers the probable cause needed for the search and, with certain narrow exceptions, a warrant must first be obtained.

The three-judge federal panel below concluded (1) that the language of §657 allows routine warrantless searches of private business premises without probable cause and (2) that the procedure violated the Fourth Amendment to the United States Constitution. This Court is urged to uphold the decision below.

At the outset, it is important to recall that the fourth amendment guarantees apply to commercial property as

well as to individual dwellings. See, e.g. *See v. City of Seattle*, 387 U.S. 541 (1967), *Go-Bart Company v. United States*, 282 U.S. 334 (1931), and *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920). Administrative searches of commercial property as well as individual dwellings have been before this Court.

In 1967, the parameters for administrative searches under the fourth amendment were considered in two companion cases. *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle*, *supra*. In *Camara*, the Court considered an administrative search of a private dwelling pursuant to a city building code. The question at issue was whether an administrative search could occur without a warrant. The Court observed initially that "(i)t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the reasonable confines of a reasonable search warrant requirement" 387 U.S. at 533, and went on to state:

"In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the fourth amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the fourth amendment guarantees to the individual, and that the reason put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the fourth amendment's protection." 387 U.S. at 534.

Therefore, this Court held that a warrant requirement exists for administrative inspections. However, in so holding, the Court emphasized that such inspections may proceed on probable cause of a different nature than that required within the criminal law:

"Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the fourth amendment, it is obvious that 'probable cause' to

issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal programs being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a 'synthetic search warrant' and thereby to lessen the overall protections of the fourth amendment. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard." 387 U.S. at 538.

The *Camara* reasoning was carried over to commercial business premises in *See v. Seattle*, *supra*. In that decision, the Court said:

"The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543.

Analysis of these two cases reveals that in all private premises, including commercial business, administrative inspections may occur only on probable cause and pursuant to a warrant, absent the type of defined situations such as exigent circumstances that would negate need for a warrant. Probable cause is determined by reasonableness of the search, and administrative probable cause is somewhat different from that needed for a warrant under criminal law. Still, probable cause is the test, and a warrant is normally required. If the agency involved can call forth legislative and

administrative authority for inspections of private property, and can demonstrate to a judicial officer that the search intended is reasonable, probable cause exists and a valid warrant may issue.

Following the decisions in *Camara* and *See*, this Court further considered warrantless searches in the administrative arena. In *Colonnade Catering Corporation v. United States*, 397 U.S. 72 (1970), a narrow exception to the warrant requirement was carved out for business activities proceeding under a license. In *Colonnade*, a federal liquor license was involved, and the Court reasoned that, given a federal license, there was implied consent to the search. However, the Court was careful to point out that the rationale of *Camara* and *See* still applied and warrantless administrative inspections or searches would be countenanced only in certain instances. Implied consent through a federal license, the Court felt, justified an exception.<sup>2</sup>

In *United States v. Biswell*, 406 U.S. 311 (1972), an administrative search was again before the Court. The case involved a firearms dealer, heavily regulated under federal law.<sup>3</sup> The Court carved out a second exception to the warrant requirement for administrative searches — pervasively regulated business. Quoting from the opinion:

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<sup>2</sup>It is worth noting, also, that the Court in *Colonnade* was dealing with a potentially dangerous product in the channels of commerce. Obviously, the public has an interest in being assured that only properly licensed liquor is distributed due to the detrimental and deleterious effects emanating from unlicensed liquor. *Colonnade* involved a dealer, not a manufacturer. Therefore, given the distribution of a potentially dangerous product, there was strong reason for subjecting a dealer in this commodity to a standard of implied consent for an inspection of his product.

<sup>3</sup>As in *Colonnade*, *supra*, *Biswell* involved a dealer of a commodity which, when distributed, could be used to injure and kill. Again, there was abundant reason to subject such a distributor to the implied consent requirement for an inspection of his product.

"It is also plain that inspections for compliance with the gun control act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection." 406 U.S. at 316.

By the time *Biswell* was decided, the requirements placed on administrative inspection by the fourth amendment were substantially crystallized. More recent decisions by this Court involving administrative inspections have closely followed the rationale developed in *Camara* and *See*. The relationship of such inspection to the fourth amendment is, we believe, as follows:

- (1) Absent narrow exceptions, administrative inspections require a valid warrant based on probable cause;
- (2) The probable cause needed for administrative searches differs somewhat from the criminal law, requiring instead proper legislative or administrative authority plus other factors showing that the inspections will be reasonable;
- (3) The legislative or administrative authority needed for probable cause must be narrowly limited in time, place and scope;
- (4) In addition to the exceptions present in the criminal law, such as exigent circumstances and direct consent, exceptions to the warrant requirement will be carefully carved out on a case by case basis; and
- (5) The narrow exceptions to date (other than the criminal law exceptions of exigent circumstances, etc.) require evidence of implied consent through participation in a licensed or heavily regulated activity involving a product which, when distributed, could present a serious threat to the public health (liquor) and safety (firearm).

In *Almeida Sanchez v. United States*, 413 U.S. 266 (1973), the Court re-emphasized the holdings in *Camara* and *See*

and found invalid a roving border search of a vehicle by United States Customs Authorities. The Court observed that a relaxed standard of probable cause exists for administrative searches, but again confirmed the need for either consent or a warrant "supported by particular physical and demographic characteristics of the area to be searched." *Almeida Sanchez v. United States*, 413 U.S. 266, 270 (1973). Although *Almeida Sanchez* struck down the roving border search by United States Customs Officials without a warrant, a routine search at a fixed point 66 miles from the Mexican border was considered reasonable in *United States v. Martinez-Fuerte*, 96 S.Ct. 3074 (1976), but significantly, the adherence of *Almeida Sanchez* to the reasoning of *Camara* and *See* was not altered.

In 1974, the Court considered a "smokestack test" taken by an inspector on private business premises. See *Air Pollution Variance Board v. Western Alfalfa Corporation*, 416 U.S. 861 (1974). Although the warrantless inspection was upheld under the "open fields" doctrine of search and seizure law, the Court expressly adhered to the pronouncements of *Camara* and *See* insofar as the need for a warrant based on probable cause is concerned.

Finally, in *G.M. Leasing Corporation v. United States*, \_\_\_\_\_ U.S. \_\_\_\_\_, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), the Court found a warrantless search of a business premises by agents of the Internal Revenue Service violative of the fourth amendment. The Court, pointing to *Colonnade* and *Biswell* said:

"In the present case, however, the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities. Rather, the intrusion is claimed to be justified on the grounds that petitioner's assets were seizable to satisfy tax assessments. This involves nothing more than the normal enforcement of the tax laws, and we find no justification for

treating petitioner differently in these circumstances simply because it is a corporation." 50 L. Ed. 2d at 544.

The constitutionality of §8(a) of OSHA must be viewed against the backdrop provided by these decisions. Considered in this manner, §8(a) falls short of the Fourth Amendment guarantee of the United States Constitution. This Court in *Camara* and *See* recognized the fundamental premise that fourth amendment guarantees apply to administrative inspections. However, as in the criminal law, the Court recognized that certain exceptions to the need for a warrant are necessarily required by the structure of our society. Occasionally, individual freedoms must bow to justifiable protection of governmental interests. Nevertheless, exceptions to the fourth amendment have been sparingly allowed and carefully considered by this Court. In *Colonnade* and *Biswell* the Court allowed an exception when the business to be inspected was proceeding under privilege of a federal license or was one pervasively regulated by the federal government. The theory of those cases is that anyone engaging in business in a heavily regulated area or under privilege of a license recognizes that one of the conditions of such business is periodic inspections by government. This is based, of course, on the doctrine of implied consent.<sup>4</sup> *Colonnade* and *Biswell* are very narrow holdings affecting limited business activity. Certainly, this Court has never taken the position that the protections of the fourth amendment should be completely taken away from owners of business premises.

The approach taken by this Court for administrative inspections, by which only narrow, carefully considered excep-

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<sup>4</sup>Fundamental to this theory, we believe, is the premise that heavily regulated or licensed activity normally involves an enterprise which is — or may become — a threat to public health and safety. The nature of such activity, therefore, requires finding implied consent for governmental inspection.

tions for warrants are allowed, is analagous to the approach taken for searches and seizures under the criminal law. Throughout history, this Court has recognized the importance of the fourth amendment to the fabric of our society. Although exceptions to the fourth amendment are sometimes essential, they are distinctly few in number and are allowed (1) only when there is a public interest strong enough to sanction a temporary loss of constitutional rights and (2) only when the rights of the individual are protected to the maximum possible degree.

The few exceptions allowed under the criminal law are well known to this Court. Warrants are not required, for example,

- (1) When exigent circumstances require immediate action before a warrant can be obtained (see *e.g.* *McDonald v. United States*, 335 U.S. 451 (1948), *Adams v. Williams*, 407 U.S. 143 (1972) — establishing identity, *Chimel v. California*, 395 U.S. 752 (1969) — eminent destruction of evidence, *Carroll v. United States*, 267 U.S. 132 (1925) — automobiles and *Cupp v. Murphy*, 412 U.S. 291 (1973) — search incident to lawful arrest for protection of officers and eminent destruction of evidence);
- (2) When the individual has consented to a search by police, thus voluntarily waiving fourth amendment guarantees (see *e.g.*, *Scneckloth v. Bustamonte*, 412 U.S. 218 (1973));
- (3) When contraband or illegal activity is within the public view (see *e.g.* *Terry v. Ohio*, 392 U.S. 1 (1968) — plain view and *Hester v. United States* 265 U.S. 57 (1924) — open fields doctrine);
- (4) Airport security searches designed to prevent massive destruction of life (see *e.g.*, *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973));
- (5) Border searches, designed to prohibit illegal entry of persons and contraband (see *e.g.*, *Boyd v. United States*, 116

U.S. 616 (1886)).

The Courts have jealously guarded fourth amendment freedoms. By so doing the guarantees of the constitution have been kept completely intact. The exceptions allowed to the requirement for a warrant have been pared down to those necessary to maintain adequate flexibility within the constitution. This Court has long recognized that the framework of the fourth amendment must be kept as strong as possible to withstand the winds of tyranny.

As in the area of criminal law, administrative inspections require a warrant from an unbiased judicial official unless a narrowly carved exception appears before the Court. Section 8(a) of OSHA would completely erase this long standing interpretation of the fourth amendment and, instead, we would have a system of government whereby expediency alone would rule. This may be seen from an analysis of the OSHA requirements themselves.

At the present time, OSHA is a blanket covering approximately five million businesses in the United States. Even an enterprise with one employee (such as a sidewalk vendor) falls under this expansive law if interstate commerce is affected. See *Wander, Small Business and the Occupational Safety and Health Act of 1970*, Library of Congress Research Service, HD7273 (April 15, 1975). In fact, of the firms subject to OSHA, some ninety percent employ twenty-five employees or less. *Ibid.*

Several Courts already have been confronted with §8(a) of OSHA. Among the reported cases, with one exception, Courts have held that a warrant was required. The case to the contrary is *Brennan v. Buckeye Industries, Inc.*, 374 F. Supp. 1350 (S.D.Ga. 1974). This decision has been criticized by the commentators (see *e.g.*, note, *Brennan v. Buckeye Industries, Inc.: the constitutionality of an OSHA warrantless search*, 1975 *Duke Law Journal* 406), and has not been

followed in subsequent decisions of other Courts.

In *Brennan v. Gibson's Products, Inc. of Plano*, 407 F. Supp. 154 (E.D. Tex. 1976), the district court citing *Camara*, *See*, and *Almeida Sanchez*, found unconstitutional a warrantless search under OSHA. The Court said that:

"No emergency existed, and no functional or general equivalent of probable cause such as *Camara* envisions is shown. This warrantless search would not comply with fourth amendment standards and cannot be countenanced." 407 F. Supp. at 162.

However, while finding that a warrantless inspection under OSHA would violate the fourth amendment, the Court went on to read into OSHA a warrant by implication. This resulted from a decision by the Court that since §8(a) of OSHA is silent on the need for a warrant, Congress must necessarily have intended a warrant by implication. This approach was taken also by another three-judge federal panel in New Mexico. *Dunlop v. Hertzler Enterprises, Inc.*, 148 F. Supp. 627 (D.N.M. 1976), held unconstitutional the warrantless searches of OSHA:

"The Colonnade-Biswell exception is applicable only if certain factors identified by the supreme court are present in a particular case. These factors may be broadly grouped and summarized as follows. First, the enterprise sought to be inspected must be engaged in a pervasively regulated business. The presence of this factor insures that warrantless inspections will pose only a minimal threat to justifiable expectations of privacy. Second, warrantless inspections must be a crucial part of a regulatory scheme designed to further an urgent federal interest. And third, the inspection must be conducted in accord with a statutorily authorized procedure, itself carefully limited as to time, place, and scope." 418 F. Supp. at 631-632.

Like the Court in *Gibson's Products, Inc. of Plano*, *supra*, the Court in this case found a warrant by implication in §8(a) of OSHA. Therefore, the legislative enactment was saved even though the search in question was found to be unconstitu-

tional because it was made without a warrant.

The three-judge federal panel below took a step in addition to the one taken in *Gibson's Products, Inc. of Plano*, *supra*, and *Hertzler Enterprises, Inc.*, *supra*, holding that (1) a warrantless administrative inspection with no vestige of probable cause violates the Fourth Amendment to the United States Constitution and (2) §8(a) of OSHA does not impliedly require a warrant but is, as it stands, unconstitutional. The States participating in this Amicus Curiae Brief urge the Court to follow the three-judge federal panel below. Certainly, in light of existing case law and in view of the specific language of the fourth amendment, blanket warrantless inspections with no semblance of probable cause should be held unconstitutional. In addition, however, a reading of a warrant requirement into §8(a) of OSHA through failure of that statute to mention need for a warrant creates a dangerous precedent in statutory construction. When a fundamental right of the constitution is concerned, statutes should be strictly construed and implications should be avoided. Certainty in legislation increases the likelihood for protection of constitutional rights. If Congress indeed intended a warrant requirement under §8(a) of OSHA, it may clearly and simply say so by an amendment to that statute.<sup>5</sup>

## II.

### THE LENIENT STANDARD OF PROBABLE CAUSE IN ADMINISTRATIVE INSPECTIONS SHOULD NOT APPLY IN THE CASE OF OSHA BECAUSE EVI-

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<sup>5</sup>We agree completely with the Appellant that "nothing in the language of the Act or in its legislative history in any way suggests that the Secretary's Inspectors are required to obtain a search warrant as a pre-requisite to gaining entry to the portion of a regulated business establishment occupied by the employer's work force." Appellant's Brief, page 22.

**DENCE GLEANED THROUGH THE INSPECTION  
MAY RESULT IN CRIMINAL PROSECUTION OF  
THE OWNER OF THE PREMISES.**

States participating in this Brief recognize that the primary reason for administrative inspections pursuant to §8(a) of OSHA is discovery of unsafe or unhealthy working conditions for employees. In addition, penalties for violation of OSHA are primarily civil in character. See 29 U.S.C.A. §666. Such inspections normally give rise to the standard of probable cause established in *Camara* and *See*. As the Court said in *Camara*:

"Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. The court thus recognized the distinction between criminal investigations and those designed to secure healthy and safe conditions pursuant to the public interest." 387 U.S. at 535.

As previously pointed out, §8(a) of OSHA is primarily designed to detect and correct occupational hazards. However, this provision may also be used to conduct a purely criminal investigation. Under §666(g) of OSHA:

"Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by fine of not more than \$10,000, or by imprisonment for not more than six months, or by both."

The situation could well arise whereby an administrative inspector, armed with information that false statements, representations or certifications have been made on records, reports or other documents maintained at the place of employment or filed with the government, might conduct an

administrative inspection specifically designed to ferret out the truth of the allegations. If so, the inspection would be made exclusively in an attempt to discover criminal violations by the owner of the premises. Evidence obtained for this purpose without a warrant and without probable cause should not be allowed to be used in a criminal trial against the individual.

Of course, the administrative inspector intending to conduct such an inspection could, in that situation, obtain in advance a valid warrant if he had probable cause. But probable cause is the key. When the inspector goes to the premises to seek criminal violation the more strict definition of probable cause applies. This, definitely, should be taken before a magistrate. Also, the inspector should not be allowed the opportunity to gloss over such an inspection by deciding, in his own discretion, that it is primarily civil in nature. This is a job which should be handled by a member of the judiciary.

**III.**

**IF OSHA INSPECTIONS MUST PROCEED PURSUANT TO A WARRANT REQUIREMENT, THIS COURT IS URGED TO SET FORTH STANDARDS WHICH MUST BE MET PRIOR TO ITS ISSUANCE.**

The decisions in *Camara* and *See* suggest that probable cause for administrative inspections differs to some degree from criminal law probable cause. Such cause will normally be found if reasonable legislative or administrative standards are present covering the inspection. But, taking an administrative regulation or statute before a judicial officer should not, in itself, establish probable cause. Rather, the official should examine the statutory and administrative standards to determine whether reasonable grounds exist

for the administrative inspection. This Court is urged, therefore, to establish minimum guidelines for probable cause for administrative inspections under OSHA.

Initially, it must be remembered that OSHA applies to all commercial activity affecting interstate commerce. This includes the complete spectrum of industry from the standpoint of danger. A business such as a shoeshine shop may present an extremely limited threat to the employee or employees involved whereas a massive chemical plant may be inherently dangerous to the employees working therein. For this reason, the standard necessary to establish probable cause for an inspection should be higher for those industries not considered inherently or extremely dangerous. This involves, of course, a degree of discretion which could appropriately be applied by a judicial officer. In addition to the distinction between commercial activity from a standpoint of danger, which should be presented to the magistrate by the administrative agency, we urge the Court to require, in addition, at least a showing of the following:

- (1) The time since the last inspection of the business premise involved;
- (2) The statutory and administrative standards relied on by the government entity;
- (3) Whether employees will be interviewed on the job site;
- (4) Whether records and other documents will be inspected on the business premises;
- (5) Whether the inspection will be limited or general;
- (6) Whether the inspection is civil in nature and designed to discover possible unsafe occupational conditions or whether the primary purpose of the inspection is to determine a possible violation subject to criminal prosecution;
- (7) Whether the inspection will necessitate downtime within the place of employment during investigation of machinery, devices, etc.;

- (8) Whether the inspector has any reason to believe that a violation exists at the job site;
- (9) Whether the inspection will necessitate use by the inspector of equipment designed for monitoring or other observation on the premises; and
- (10) The time during which the inspection will take place and whether that time coincides with the normal business hours of the commercial activity.

### CONCLUSION

The need for a warrant based on probable cause prior to an administrative inspection was clearly enunciated by this Court in the *Camara* and *See* decisions. Basically, the need for a warrant is the same as that necessary under the standard criminal law except that the showing for probable cause is viewed somewhat differently. As in the criminal law, exceptions to the need for a warrant in the administrative arena apply only in special, narrowly defined cases. The theory is that in both the administrative area and in the criminal law some flexibility within the constitution is necessary in order to balance public and individual interests. Significantly, warrantless inspections in this country have always been the exception rather than the rule.

Section 8(a) of OSHA would sweep away the need for a warrant for approximately five million diversified businesses in this country. The shoeshine boy on the corner stands with General Motors as far as OSHA is concerned. Surely, the Fourth Amendment to the United States Constitution cannot be subjected to such severe erosion.

We recognize that OSHA inspectors could proceed with their duties much more expeditiously if a warrant requirement was absent. This justification, however, has been used countless times in the past by law enforcement officers.

Traditionally, it has been rejected. Justifiable ends and convenience of enforcement are not themselves enough to permit warrantless searches. If the contrary were true, warrants would be found only in the past and our fourth amendment freedoms no longer would exist.

For the reasons set forth in this Brief, Amicus Curiae urge the Court to uphold the decision of the three-judge federal panel below.

DATED This 29<sup>th</sup> day of September, 1977.

Respectfully submitted,

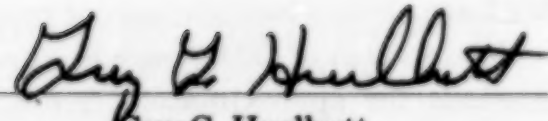
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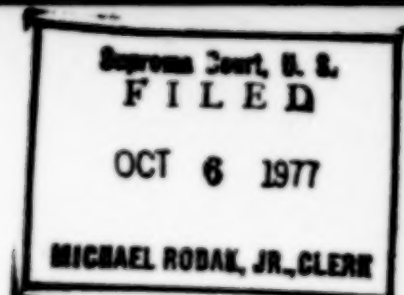
By



Guy G. Hurlbutt

ATTORNEYS FOR AMICUS CURIAE

State of Idaho



No. 76-1143

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In the  
**Supreme Court of the United States**

OCTOBER TERM, 1977

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RAY MARSHALL, SECRETARY OF LABOR, ET AL.,  
*Appellants,*

*vs.*

BARLOW'S, INCORPORATED,  
*Appellee.*

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**BRIEF FOR THE ROGER BALDWIN FOUNDATION  
INC. OF THE AMERICAN CIVIL LIBERTIES UNION,  
ILLINOIS DIVISION, AS AMICUS CURIAE**

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**BRIEF FOR THE ROGER BALDWIN FOUNDATION  
INC. OF THE AMERICAN CIVIL LIBERTIES UNION,  
ILLINOIS DIVISION, AS AMICUS CURIAE**

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MAY IT PLEASE THE COURT:

The Roger Baldwin Foundation of ACLU, Inc. respectfully submits this brief *amicus curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk of the Court.

### INTEREST OF THE AMICUS

The Roger Baldwin Foundation of the ACLU, Inc. (RBF) is an Illinois, non-partisan, not-for-profit corporation affiliated with the American Civil Liberties Union, Illinois Division, an organization consisting of approximately 7,000 members throughout Illinois, and committed solely to defending the liberties guaranteed by the Bill of Rights.\* One of the most important of those liberties is the right to be free of unreasonable searches. The central issue in this case is whether that right is infringed by the Occupational Safety and Health Act (OSHA). RBF is presently involved as counsel in other litigation in the lower courts in which it is contending that warrantless administrative searches of residential and commercial premises by employees of the Department of Justice violates the Fourth and Fourteen Amendments. The ruling in the present case could affect the outcome of that litigation. Moreover, while the governmental interest sought to be advanced here—safety in the work place—is important, we believe that important governmental interests cannot, and need not, be achieved through unconstitutional means. Instead, the Court should once again resist “the pressure of official expedience against the guarantee of the Fourth Amendment.” *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973).

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\* Amicus wishes to make clear that this brief states solely the position of The Roger Baldwin Foundation of ACLU, Inc. The American Civil Liberties Union national Board of Directors has decided to take no position before this court in this case.

### STATEMENT OF THE CASE

*Amicus* accepts the statement of facts and proceedings below contained on Pages 9-11 of Appellants' Brief. Briefly, Appellee objected on Fourth Amendment grounds to a random, warrantless inspection of the non-public work areas of its commercial premises, conducted pursuant to the Occupational Safety and Health Act, 29 U.S.C. 567(a) (OSHA). A three-judge court ruled that OSHA authorizes such inspections, and ruled that OSHA is, therefore, unconstitutional under *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967). *Barlow's, Inc. v. Uesery*, 424 F.Supp. 437 (D. Idaho 1976). The provisions of 29 U.S.C. §657(a) state as follows:

- a) In order to carry out the purposes of this chapter, the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
  - (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
  - (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

### SUMMARY OF ARGUMENT

*POINT 1.* OSHA can and should be construed to require a warrant for random inspections of commercial premises.

**POINT II.** If OSHA authorizes warrantless inspections in the circumstances of this case, it is unconstitutional under the fourth amendment.

The history of the Fourth Amendment shows that it was intended to prevent unreasonable searches of commercial premises. This case is controlled by *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), rather than by *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), because OSHA does not apply solely to industries long subject to close regulation and governmental licensing.

Requiring a warrant for random, unconsented inspections would not unduly impair enforcement of OSHA's provisions. First, the element of surprise, if necessary, can be satisfied by issuance of warrants which are *ex parte* as a routine matter. Second, administrative costs in procuring warrants are insufficient to overcome the Fourth Amendment guarantee against unconstitutional searches and seizures because a warrant requirement protects against the exercise of otherwise unreviewable discretion by officials in the field.

**POINT III.** The court need not and should not decide the appropriate standard for issuance of a warrant under OSHA.

The court could construe OSHA to require a warrant, as suggested by *Amicus*, or could hold OSHA unconstitutional because it cannot be construed to require a warrant. In either event, it would be appropriate to defer judgment on the appropriate standard for issuance of a warrant until there are appropriate proceedings in the lower courts in which that question is considered.

## ARGUMENT

This case involves an attempt to conduct a routine and random inspection of the non-public areas of a small corporation engaged in the installation of electrical and plumbing fixtures, heating, and air-conditioning units. It is "undisputed" that the inspector "did not have any cause, probable or otherwise, to believe a violation existed nor was he in possession of any complaint by any employee. . ." *Barlow's Inc. v. Usery, supra*, at 439.\*

Appellee's business is not licensed or closely regulated by the federal government and never has been. It is not an inherently or unusually dangerous business. There was no claim or showing below that Appellee's business in particular, or that type of business in general, is likely, or more likely than other businesses, to be in violation of OSHA's provisions. It is conceded that the attempted inspection was not based on any "history of past violations." (Appellants' Brief, p. 9, n. 7)

There was no claim or showing below that there were or might be dangerous conditions on the premises, or that prompt inspection was for any other reason essential. To the contrary, after entry was refused, Appellants waited over a month before applying for a court order to compel inspection. 424 F.Supp. at 438-439.

Finally, there was no consent to the attempted search, either by management or by the employees whose work

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\* The constitutionality of a warrantless search that is triggered by a complaint from an employee is, therefore, not at issue in this case.

areas were to be inspected. The president of the company denied entry for the stated reason that the inspector did not have a search warrant.

In these circumstances, this court's decisions compel the conclusion that a warrantless inspection of Appellee's premises violates a fair construction of the Act to require a search warrant or if no such construction were possible, the warrantless inspection would violate the Fourth Amendment.

#### **I. OSHA CAN AND SHOULD BE CONSTRUED TO REQUIRE A WARRANT.**

In *Crowell v. Benson*, 285 U.S. 60, 62 (1932), the Court ruled that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

In *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973), the court acknowledged a "duty" under "familiar principles of constitutional adjudication" to "construe the statute, if possible, in a manner consistent with the Fourth Amendment." 413 U.S. at 272. See to the same effect, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring in part and dissenting in part).

OSHA can fairly be construed to require either consent or a warrant, and several lower courts have expressly so ruled: *Brennan v. Gibson's Products, Inc.*, 407 F.Supp. 154, 162-163 (E.D. Texas 1976) (appeal pending, 5th Cir. No. 76-1526); *Usery v. Centrif-Air Machine Co., Inc.*, 424 F.Supp. 959 (N.D. Ga. 1977) (appeal pending, 5th Cir.

No. 77-1511); *Dunlop v. Hertzler Enterprises, Inc.*, 418 F.Supp. 627 (D. N. Mex. 1976) (appeal pending, 10th Cir. No. 76-2020); and *Usery v. Rupp Forge Co.*, ..... F.Supp. .... (N.D. Ohio, No. 76-C-385, April 22, 1976) (appeal pending, 6th Cir., No. 76-1960).

As the court in *Brennan v. Gibson's Products*, noted, OSHA does not expressly authorize warrantless searches, and the legislative history on that point, though sparse and ambiguous, is not inconsistent with a warrant requirement. 407 F.Supp. at 162-3. To the contrary, as Appellants have candidly acknowledged, "Representative Steiger, the author of the version of Section 8(a) [the 'without delay' section] of the Act which ultimately prevailed in conference, stated that while prompt unannounced inspections are essential to the Act's enforcement, they were meant to be carried out 'in accordance with applicable constitutional protections.' Leg. Hist. 1077." (Appellants' Brief pp. 51-52) The "constitutional protections" that were "applicable" in 1970, when OSHA was enacted, were specified in the court's decision in *Camara* (1967) and in *See* (1967), both of which required warrants for administrative inspections.

If Congress *had* provided a penalty for refusal to permit warrantless OSHA inspections, that would have suggested that Congress did not believe employers have a constitutional right to refuse warrantless inspections under OSHA. But as Appellants acknowledge, Congress did *not* authorize any penalty for simple refusal to permit a warrantless OSHA inspection. (Appellants' Brief, pp. 8, 14 and 34) The absence of a penalty thus suggests that Congress did not intend to authorize warrantless OSHA inspections when the employer objects on constitutional grounds.

Moreover, the failure of Congress to impose a penalty for refusal of warrantless inspections suggests that Congress recognized that there was a right to require warrants. It can hardly be presumed that Congress would attempt to penalize the exercise of a constitutional right. Thus, in other circumstances, when Congress believed warrantless inspections *would* be constitutional, it penalized refusal to permit such inspections. For example, under the statute applicable in the *Colonnade* case, 26 U.S.C. §7342, Congress expressly authorized a \$500 penalty for refusal to permit a warrantless inspection pursuant to the statute. 397 U.S. at 74. This court agreed with Congress that warrantless inspections, in the circumstances of that case, would not be unconstitutional.

In short, construing OSHA to require a warrant would be more consistent with Congressional intent than enjoining OSHA inspections entirely, and would cause much less disruption of on-going OSHA inspection efforts.

## **II. IF OSHA AUTHORIZES WARRANTLESS INSPECTIONS IN THE CIRCUMSTANCES OF THIS CASE, IT IS UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT.**

### **A. The History of the Fourth Amendment Shows that It was Intended to Prevent Unreasonable Searches of Commercial Property and Commercial Premises.**

As the court has recently noted, *United States v. Chadwick*, ..... U.S. ...., 53 L.Ed.2d 538, 546 (June 21, 1977), "[I]t cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [which] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods."

James Otis, in his often-cited speech against the writs of assistance, called them "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book." 1 *The Bill of Rights: A Documentary History* 189 (B. Schwartz, ed., 1971) (hereinafter, "Schwartz"), quoting from *Legal Papers of John Adams*, 134-144 (Z. L. Wroth and H. Zibot, eds., 1965). Private homes were not the only places intended to be protected from arbitrary and unreasonable searches. For example, Otis attacked the writs of assistance because they authorized a person "in the daytime [to] enter all houses, shops, . . ." Schwartz, *supra*, at 190 (emphasis added).

John Adams also noted and criticized the commercial reach of the writs of assistance, describing the writs as authority for government officials "to attend and aid them in breaking open houses, stores, shops, cellars, ships, bales, trunks, chests, casks, packages of all sorts, to search for goods, wares, and merchandise, which had been imported against the prohibitions or without paying the taxes imposed by certain acts of Parliament . . ." Letter of Adams to William Tudor, March 29, 1817, 10 244-249 (C.F. Adams, ed., 1856). In short, a chief complaint of the colonists was that writs of assistance authorized arbitrary and unreasonable searches of commercial property and commercial premises.

The article in the Bill of Rights that was to become the Fourth Amendment can be traced to a proposal at the Virginia state ratifying convention in 1788 that a Bill of Rights should be taken up by the First Congress under the new Constitution, including the following article: "That every free man has a right to be secure from all unrea-

sonable searches and seizures of his person, his papers, and *property*; all warrants, therefore, to search *suspected places* . . . without information on oath . . . of legal and sufficient cause, are grievous and oppressive . . .” 2 Schwartz, *supra*, at 841-842 (emphasis added).

Thus, the history of the Fourth Amendment shows that the amendment was intended to prevent unconsented, warrantless searches of commercial premises. Cf. *Chadwick v. United States*, *supra*, 53 L.Ed. 546-547.

**B. The Mere Fact of Doing Business Affecting Interstate Commerce Does Not Constitute a Waiver of Rights Under the Fourth Amendment and Consent to Warrantless Inspections Under OSHA.**

This case is controlled by the court’s holding in *Camara*, reaffirmed in *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), 50 L.Ed. 2d 530, 547 (1977), that “except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” In *Camara*, the court specifically overruled *Frank v. Maryland*, 359 U.S. 360 (1959), and rejected the contention made by the state government in that case that one of the classes of cases that should be excepted from the warrant requirement is “administrative inspection programs” such as the municipal health, safety and fire code inspections involved in *Camara* and *Frank*.

In *See*, the companion case to *Camara*, the court held that the protections of the Fourth Amendment outlined in *Camara* were applicable to commercial premises. Rejecting an argument similar to the government’s argument in this case that its regulation of the nation’s work places under OSHA automatically opens those work places

to warrantless inspections, the court observed in *See* that “[t]he businessman, too, has that right [to be free from unreasonable official entries into his commercial premises] placed in jeopardy if the decision to enter and inspect for violation of *regulatory* laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.” 387 U.S. at 543 (emphasis added). The court concluded that administrative inspection of commercial premises “not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.” 387 U.S. at 545.

In the next two cases to consider administrative inspections, *Colonnade* and *Biswell*, the court “approved warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the government.” *Almeida-Sanchez v. United States*, 413 U.S. at 270-271.

Appellants and amicus AFL-CIO argue that this case is like *United States v. Biswell* and *Colonnade* and unlike *Camara*, *See*, and *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). That argument is not persuasive.

In *G. M. Leasing* the court carefully distinguished *Colonnade* and *Biswell* from *Camara* by pointing out that *Colonnade* and *Biswell* involved businesses engaged in “a highly regulated activity.” 50 L.Ed. 2d at 547. (*Biswell* involved firearms regulation; *Colonnade* involved liquor regulation.) Moreover, *G. M. Leasing* and *Almeida-Sanchez* reaffirm the fact that the Fourth Amendment was deemed to be of limited applicability in *Colonnade* and *Biswell* only because of the intensely regulated nature of the particular businesses there involved, not because any business regulated in any way by the government would involuntarily waive its Fourth Amendment rights by virtue of the exis-

tence of the regulation. Thus, OSHA, which applies to all employers within the full reach of Congress' commerce powers, is not the type of "licensing and regulation" scheme which the court addressed in *Colonnade* and *Biswell*.

Appellants' argument, if accepted, would authorize the warrantless search of virtually any "corner" store and would effectively repeal the Fourth Amendment with respect to all commercial enterprises.

**C. Requiring a Warrant for OSHA Inspections Would Not Impose Unacceptable Burdens Upon OSHA's Enforcement.**

The contention that a warrant requirement would impose unacceptable burdens on OSHA enforcement efforts assumes, first, that a warrant requirement would eliminate the element of surprise and thereby facilitate concealment of violations; and, second, that a warrant requirement would be prohibitively burdensome, thus justifying a departure from Fourth Amendment safeguards. Both of those assumptions are incorrect.

1. *A warrant requirement would not eliminate the element of surprise.* Search warrants are routinely issued *ex parte* by federal magistrates throughout the United States. Rule 41, Federal Rules of Criminal Procedure. *Ex parte* warrants could be issued and executed without prior notice to the employer. Thus this court observed in *See, supra*, at 545, and in *Almeida-Sanchez, supra*, at 283: "Nothing in the papers before us demonstrates that it would not be feasible for the border patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time." 413 U.S. at 283.

2. *The administrative burden of a warrant requirement would not justify abrogating constitutional rights to be free of unreasonable searches and seizures.* The government has made the administrative burdens argument in previous search cases only to have it emphatically rejected by this court. Thus, the Court in *Almeida-Sanchez v. United States* upheld the applicability of Fourth Amendment safeguards against claims of excessive burden on law enforcement in the immigration search context. It said:

The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

"These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. *Brinegar v. United States*, 338 U.S. 160, 180, 69 S.Ct. 1302, 1313, 93 L.Ed. 1879 (Jackson, J., dissenting)." 413 U.S. at 273-274.

**D. A Warrant Requirement Would Protect Important Constitutional Interests.**

Appellants argue that a warrant requirement is unnecessary because of various safeguards in the Act which authorize inspections only upon presentation of appropriate credentials and "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner. 29 U.S.C. §657(a)(2) (1970)" (Appellants' Brief, pp. 24-31.)

However, the court has consistently ruled that "broad statutory safeguards are no substitute for individualized review . . ." and that the discretion thus left to the official in the field "is precisely the discretion which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Camara, supra*, at 532-533. See also to the same effect, *Almeida-Sanchez v. United States*, 413 U.S. at 273; and *United States v. United States District Court*, 407 U.S. 297 (1972), where the court decisively rejected the government's similar arguments supporting complete administrative discretion.

In *United States v. United States District Court*, even when the government's interest was preservation of domestic security, the court observed through Mr. Justice Powell:

The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government . . . Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. 407 U.S. at 317-18 (footnote omitted).

What constitutes "regular working hours," "reasonable times," "reasonable limits," and a "reasonable manner" is presently left to the discretion of the inspector. Therefore, even if the inspector erroneously concludes that a particular inspection would be "reasonable," the courts have unanimously held that the erroneous interpretation of the Act does not entitle the employer to dismissal of ensuing charges or to suppression of evidence gathered during the unreasonable inspection, absent a showing of "prejudice"

to his defense of the charges. E.g., *Hoffman Construction Co. v. OSHRC, et al.*, 546 F.2d 281 (9th Cir. 1974); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071 (9th Cir. 1976); *Chicago Bridge and Iron Co. v. OSHRC*, 535 F.2d 371 (7th Cir. 1976); *Accu-namics, Inc. v. OSHRC*, 515 F.2d 828 (5th Cir. 1975); *Secretary v. Western Waterproofing Co., Inc.*, OSHRC Docket No. 9739, 5 BNA OSHC 1496 (1977); *Secretary v. Bob's Tools & Supply Co., Inc.*, OSHRC Docket No. 13972, 4 BNA OSHC 1445 (1976).\*

### III. THIS COURT NEED NOT AND SHOULD NOT DECIDE THE APPROPRIATE STANDARD FOR ISSUANCE OF A WARRANT UNDER OSHA.

The court below did not construe OSHA to require a warrant, as urged in Point I of this Brief. Accordingly, it was not necessary for the court below to consider the appropriate standard for issuance of a warrant under OSHA, and it did not.

As this court expressly noted in *Camara, See* and *Almeida-Sanchez*, the precise standard of what constitutes "probable cause" to issue an administrative inspection warrant in a non-criminal context will depend upon factors that may vary from case to case. The factors noted in *Camara* included "the governmental interest which allegedly justifies official intrusion" (387 U.S. at 534), the "reasonable goals of code enforcement" (387 U.S. at 535) and an "appraisal of conditions in the area as a whole" (387 U.S. at 536). The appropriate standards, ruled *Camara*, "will vary with the . . . program being enforced, [and] may be based upon the passage of time, the nature

\* Appellants' assertion that area directors, not inspectors, decide which businesses to inspect (Br. 37) is irrelevant because area directors, like inspectors, are not the "disinterested" parties contemplated by *Camara*.

of the building . . . or the condition of the entire area . . .” 387 U.S. at 538.

In *See*, the court noted that “any constitutional challenge to [administrative inspection] programs can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of “reasonableness.” 387 U.S. at 546. Similarly, in *Almeida-Sanchez*, the court cited *Camara* for the proposition that warrants could issue based upon “particular physical and demographic characteristics of the areas to be searched.” 413 U.S. at 270.

One of the significant differences between OSHA inspections and traditional fire and safety inspections is that OSHA inspections by statute, can be triggered by complaints from employees. Thus, for example, a complaint by an employee might be one consideration in determining whether there were sufficient bases for issuance of an administrative inspection warrant.

Another significant difference between OSHA random inspections and other random inspections is that OSHA inspections are not based on “area” but on “accident experience and the number of employees exposed in particular industries.” (Appellants’ Brief, p. 9, n. 7). These considerations might be also appropriately taken into account in determining whether a search warrant were properly to be issued.

In short, appropriate standards for issuance of a warrant under OSHA may be significantly different from the standards for issuance of warrants under the quite different regulatory provisions at issue in *Camara* and *See*. Accordingly, it would be appropriate to defer judgment on this issue until the court below, or Congress, has had an opportunity to consider the issue.

## CONCLUSION

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This court should construe OSHA to require a warrant, for unconsented inspections of commercial premises or the applicable search provisions should be held to be unconstitutional.

Respectfully submitted,

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No. 76-1143

Supreme Court, U. S.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

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**RAY MARSHALL, SECRETARY OF LABOR,  
ET AL., APPELLANTS**

**v.**

**BARLOW's, INC.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO**

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**REPLY BRIEF FOR THE APPELLANTS**

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**In the Supreme Court of the United States**

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*ON APPEAL FOR THE UNITED STATES DISTRICT  
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---

**REPLY BRIEF FOR THE APPELLANTS**

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1. We have urged that the Fourth Amendment does not require the Secretary of Labor to obtain a search warrant to conduct statutorily authorized inspections during regular working hours of the portions of commercial premises routinely occupied by an employer's work force. Our principal submission is that an employer has a diminished privacy interest in the areas of his workplace that he opens up to his employees and that the prerequisite of a warrant would frustrate the need for unannounced inspections while providing only negligible protections beyond those already afforded by the Act's inspection scheme. This balancing approach, in which the interests of the regulatory inspection are weighed against the possibilities of abuse and the threat to privacy, is the central element of the Court's pertinent Fourth Amendment jurisprudence. See, *e.g.*, *Camara v. Municipal*

*Court*, 387 U.S. 523; *See v. City of Seattle*, 387 U.S. 541; *Colonnade Catering Corp. v. United States*, 397 U.S. 72; *United States v. Biswell*, 406 U.S. 311.

As we have argued at greater length at pp. 41-47 of our opening brief, we believe that this case is governed by the analysis of *United States v. Biswell*, *supra*, in which the Court upheld a warrantless search of a locked commercial storeroom as part of a federal gun control inspection program. Appellee claims (Br. 36-40) *Biswell* is distinguishable because it involved inspection of the premises of "a dealer [who] chooses to engage in this pervasively regulated business and to accept a federal license" (406 U.S. at 316) while OSHA extends to all "businesses affecting interstate commerce" (29 U.S.C. 651(3)).

But *Biswell* does not turn on the narrow rationale that the Gun Control Act was directed at a single industry licensed by the federal government. The Court there emphasized the "pervasive" regulation of the firearms business and the federal licensing requirements of the Act as evidence that "inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy" (406 U.S. at 316). While those elements supported the conclusion that "the threat to privacy \* \* \* [was] not of impressive dimensions" (*id.* at 317), these are not the exclusive means of demonstrating that a federal regulatory inspection may proceed without a warrant when specifically authorized by statute. The critical questions are whether warrantless regulatory inspections are needed to further an important interest and whether the proprietor of the premises has a privacy interest in the area and subject matter to be inspected that justifies the intervention of a judicial officer. In this respect, the scope of the congressional regulation is irrelevant; it may seek to deal

with a narrow problem applicable only to a particular industry or it may respond to a broader range of evils. But the breadth of the congressional regulation does not of itself create privacy interests that otherwise would not exist. Thus, the fact that OSHA is not directed to a particular federally licensed activity but encompasses all business subject to Congress' power to regulate interstate commerce does not serve to create reasonable expectations of privacy in areas that employers have already opened to their workers. *See Youghioghney & Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 51-52 (S.D. Ohio); *United States v. Del Campo Baking Mfg. Company*, 345 F. Supp. 1371, 1376-1377 (D. Del.).

Here, the very history of the matter shows that an employer has no reasonable expectation of privacy against regulatory inspection of his employees' workplace sufficient to invoke the warrant requirement. In enacting OSHA, Congress expressly recognized the "long-established statutory precedent in both Federal and State law to require employers to provide a safe and healthful place of employment." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 10 (1970), Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. 150 (1971) ("Leg. Hist."). As the Senate Report further observed (*ibid.*), "[o]ver 36 states have provisions of this type, and at least three Federal laws contain similar clauses, including the Walsh-Healey Public Contracts Act, the Service Contract Act, and the Longshoremen's and Harbor Workers' Act." *See also* H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 21 (1970), Leg. Hist. 851. These historical antecedents offer persuasive testimony that an employer has little realistic privacy interest in employee work areas vis-a-vis an inspection authorized by statute to protect the safety and health of the employees he has assigned to such areas.

The Occupational Safety and Health Act thus reflects an historical concern by both the federal and state governments that the Nation's workers are entitled to a safe and healthful environment to be enforced by on-site inspection. As in control of firearms, Congress has determined that "[l]arge interests are at stake, and inspection is a crucial part of the regulatory scheme" (406 U.S. at 315). The history of industrial safety regulation effectively refutes appellee's claim that it has any justifiable expectation of privacy—from statutorily authorized, and limited, regulatory inspections—in its employee work areas that would implicate the warrant requirements of the Fourth Amendment.<sup>1</sup>

2. Appellee alternatively argues (Br. 51-58) that if the Court concludes that the Fourth Amendment requires the issuance of a warrant as a prerequisite to an inspection under the Act, that such a warrant should be (Br. 51) "based on relevant probable cause standards." In appellee's view, "the inspector should be required to show, at a minimum, facts demonstrating that the statutory findings of present danger to safety and health of

<sup>1</sup>The Food and Drug Administration inspection decisions, upon which appellee relies (Br. 49-50), do not authoritatively support its claim that a warrant is required for an OSHA inspection. Each of those cases was decided prior to *Biswell* and does not take into account this Court's view that Congress can constitutionally adopt a warrantless "regulatory inspection system of business premises that is carefully limited in time, place, and scope" to be conducted pursuant "to the authority of a valid statute" (406 U.S. at 315). Since *Biswell*, the only decisions have rejected the argument that a Food and Drug Administration inspection requires a warrant. See *United States v. Del Campo Baking Mfg. Company*, *supra*; and *United States v. Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla.); cf. *United States v. Litvin*, 353 F. Supp. 1333 (D. D.C.).

employees apply to a reasonably relevant fact situation (e.g., an industry-wide problem, an area health hazard, or specific complaints) directly affecting the business to be investigated" (Br. 55-56).

But the Court emphatically rejected much the same contention more than a decade ago in *Camara v. Municipal Court*, *supra*. There, the petitioner urged that "warrants should issue only when the inspector [has] probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced" (387 U.S. at 534). In refusing to adopt a strict probable cause standard, the Court recognized that area code enforcement inspections have a long history of judicial and public acceptance, that an urgent public interest demands the abatement of unsafe conditions, and that because such inspections are neither personal in nature nor aimed at the discovery of crime, they involve a relatively limited invasion of the urban citizen's privacy (see 387 U.S. at 537). Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, the Court held that "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (387 U.S. at 538).

There can be no doubt that the "general schedule" inspection at issue in this case would meet the standard of *Camara*. As we have pointed out in our opening brief (p. 9, n. 7, 37, n. 17), such inspections are carried out in accordance with objective criteria based upon accident experience and the number of employees exposed in particular industries; the inspected establishments are selected by area directors applying these criteria, not by the officers in the field. The essence of the general

schedule inspection is that it is a random spot check to establish enforcement of the Act on a representative basis. While the Secretary has also undertaken inspections on information that particular industries are especially hazardous,<sup>2</sup> as well as inspections in response to fatal accidents (29 C.F.R. 1904.8) and employee complaints of specific workplace hazards,<sup>3</sup> the general schedule inspection is needed to fulfill the congressional promise of assuring "every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651). As long as the Secretary can demonstrate a reasonable basis under the Act for selecting particular businesses or classes of businesses for inspection, the issuance of a warrant need not "depend upon specific knowledge of the condition of the particular \* \* \* [workplace]," *Camara v. Municipal Court*, *supra*, 387 U.S. at 538. Accord, *e.g.*, *Reynolds Metals Co. v. Secretary*, (W.D. Va.), Civ. No. 770215, decided October 13, 1977. Appeal pending C.A. 4, No. 77-0215.

3. Our principal contention remains, however, that the requirement of *Camara* and *See* that warrants be utilized in administrative compliance inspections, is limited to situations giving rise to the concerns there expressed by the Court—situations where a significant justifiable privacy expectation is involved, where occupants are subject to

<sup>2</sup>See, *e.g.*, *Marshall v. Chromalloy American Corp.*, E.D. Wis., No. 77-C-291, decided July 12, 1977, appeal pending, C.A. 7, No. 77-1744 (showing OSHA inspection was sought to secure compliance in high risk foundry industry sufficient); *Milton Morris v. Department of Labor*, S.D. Ill., No. 77-5068, decided September 20, 1977.

<sup>3</sup>29 U.S.C. 657(f)(1). See, *e.g.*, *Matter of Gilbert and Bennett Manufacturing Company*, N.D. Ill., No. 77-C-856, decided April 12, 1977, appeal pending, C.A. 7, No. 77-1459.

individual field officers' discretion to inspect and must run a criminal gauntlet even to determine the inspection's necessity and scope, and where there is no showing that a warrant requirement would hamper meaningful enforcement. See 387 U.S. at 531, 532-534, 543, 545. Read in the light of subsequent decisions, those cases mean that the validity of particular warrantless inspection programs must be determined "on a case-by-case basis" (387 U.S. at 546) which properly weighs occupants' legitimate expectations of privacy in the subjects regulated and the areas to be inspected, against the scope of the authorized intrusion, the danger of institutionalized abuse, the extent to which warrants issued under administrative cause standards would provide appreciably more protection than that afforded by the statutory program itself, and any express congressional finding that a limited warrantless inspection authority is necessary—and hence "reasonable"—to effectuation of the particular statutory program. *E.g.*, *Colonnade Catering Corp. v. United States*, *supra*, 397 U.S. at 76-77 (opinion of the Court), 78-79 (Burger, C.J., concurring in relevant part), 80-81 (Black, J., same); *Biswell*, *supra*, 406 U.S. at 316-317; *Cady v. Dombrowski*, 413 U.S. 433, 439-442; *South Dakota v. Opperman*, 428 U.S. at 367-368, 370 n. 5, 372-376 (opinion of the Court), 382-384 (Powell, J., concurring); *United States v. Martinez-Fuerte*, 428 U.S. at 555, 559-562, 564-566.

The opinion below, and the other district court opinions upon which appellee relies, do not, however, even attempt to identify the interests pertinent to this balancing process, let alone undertake to balance them. For the reasons stated in our opening brief, we submit that a proper application of that analytical balancing process to the important statutory inspection program at issue here should persuade this Court to uphold it.

**CONCLUSION**

For the foregoing reasons and for those in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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DECEMBER 1977.